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THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

A REPORT

PREPARED BY THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

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LETTER OF TRANSMITTAL

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C., September 16, 1983.

Hon. WILLIAM V. ROTH, Jr.,
Chairman, Committee on Governmental Affairs, Washington, D.C.

DEAR MR. CHAIRMAN: The Subcommittee on Oversight of Government Management transmits the following report on the role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program.

On June 8, 1983, the Subcommittee held a hearing to investigate allegations that Administrative Law Judges (ALJs) in the Social Security disability program are subject to improper pressure from the Social Security Administration (SSA) to deny more disability cases at an increasingly faster rate. Also investigated were allegations that the SSA is interfering with the decisional independence and impartiality of its ALJs by incorporating internal agency guidelines, the Program Operation Manual Systems (POMS), into Social Security Rulings (SSRs), thereby making the internal agency guidelines binding on the ALJs; and by utilizing the policy of "non-acquiescence" which prohibits ALJs from giving selected federal court decisions precedential weight in the adjudication of disability claims.

The Subcommittee received testimony from the Social Security Administration, the Association of Administrative Law Judges, Inc., individual ALJs, academic scholars in the fields of administrative and constitutional law, and an attorney representing several disabled claimants in a lawsuit against the SSA.

The Subcommittee's principal finding is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the ALJ allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983.) The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

The Subcommitee recommends that:

(1) The SSA immediately discontinue all Bellmon Review activity;

(2) The SSA stop all managerial, administrative, and policy-related activity directly or indirectly aimed at influencing the ALJs' allowance rates;

(3) the Judiciary Committees of the House and/or Senate review the propriety and legality of the SSA's actions regarding ALJ productivity.

The Subcommittee recognizes that although there is a need for the Social Security disability adjudicative process to be uniform and efficient, these goals must not override the obligation to ensure that severely disabled persons receive full, fair, and impartial treatment in the appeals process. The recommendations of the Subcommittee are designed to help ensure that the position and authority of one of the vanguards for such fair treatment, the ALJ, is protected.

Sincerely,

WILLIAM S. COHEN,
Chairman.

CARL LEVIN,
Ranking Minority Member.

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I. INTRODUCTION

On June 8, 1983, the Subcommittee on Oversight of Government Management conducted a hearing to examine several issues that had surfaced in the adjudicative process of the Title II, Social Security Disability Insurance Program (SSDI):[1]

(1) Allegations that Administrative Law Judges (ALJs) in the Social Security disability program are subject to improper pressure by the Social Security Administration (SSA) to deny more disability cases and achieve and maintain a specified case disposition rate; and

(2) Allegations that the SSA is interfering with the decisional independence and impartiality of its ALJs by incorporating internal agency guidelines, the Program Operation Manual Systems (POMS), into Social Security Rulings (SSRs), thereby making the internal agency guidelines binding on the ALJs; and by utilizing the policy of "non-acquiescence" which prohibits ALJs from giving selected Federal court decisions precedential weight in the adjudication of disability claims.

Concern for these issues arose as a result of a hearing held by the Subcommittee on May 25, 1982, which investigated actions taken by the SSA in reviewing the continuing eligibility of disabled individuals receiving SSDI benefits. The Subcommittee concluded in a report on that hearing that the benefits of large numbers of severely disabled individuals and their dependents were being unfairly terminated, that major procedural reforms in the review process were needed, and that the independent role of the ALJ in determining disability was critically important and should be preserved.[2]

This is not the first time that allegations about undue pressure on SSA ALJs have been made. As early as 1972, the SSA and its ALJs were having disputes over productivity goals and reversal rates.[3] Throughout the 1970's, there was a steady increase in the number of applications for disability benefits and subsequent requests for ALJ hearings.[4] At the same time, there was a continuing increase in the rate at which ALJs were allowing benefits for claimants who had been denied or terminated at the State level.[5] This increasing disparity between decisions at the State and ALJ levels generated concern

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[1] Under Title II of the Social Security Act, workers who suffer severe physical or mental impairments and are unable to work receive disability benefits by way of monthly payments. In order to be eligible for the Title II program, a claimant must have worked for a set number of years and contributed to the program through Social Security payroll tax deductions. 42 U.S.C. § 416 et. seq.; 20 CFR 404.

[2] See Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, "Oversight of the Social Security Administration Disability Reviews," August 24, 1982.

[3] See Report of the United States Congress, House Committee on Ways and Means, Subcommittee on Social Security, "Social Security Administrative Law Judges: Survey and Issue Paper," January 27, 1979, p. 67.

[4] See Committee print of the Committee on Finance, United States Senate, "Staff Data and Materials Related to the Social Security Disability Insurance Program," August 1982, pp. 69–70.

[5] *Supra* fn. 3 at 66. See also Id. at 13.

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among members of Congress about the inconsistencies between the evaluation processes and techniques used at the two levels of adjudication.[6]

In response to this concern, Senator Henry Bellmon introduced an amendment which was enacted into law as part of the Social Security Disability Amendments of 1980,[7] which required the SSA to review the decisions of its ALJs.[8] The implementation of that amendment combined with the 1980 statutory requirement that SSDI beneficiaries with non-permanent disabilities undergo "continuing disability investigation" (CDI) reviews at least once every three years,[9] brought the allegations of undue pressure to a crisis.

In implementing the "Bellmon Review," the SSA decided to initially review only the allowance decisions to ALJs with high allowance rates regardless of the potential accuracy or inaccuracy of those decisions.[10] Many of the ALJs viewed this process as a way to target and punish those ALJs who granted a high number of allowances. In addition, although according to the statute the CDIs were not to be implemented until January 1982,[11] the SSA instituted the reviews in March 1981,[12] without adequate preparation. This had two significant consequences to the ALJs. First, in part because of the lack of preparation for the reviews, the sheer volume of cases to be reviewed, and other reasons discussed in the Subcommittee's May 25, 1982, report, thousands of disabled individuals were improperly terminated at the State level. Instead of the predicted termination rate of 20 percent, within the first twelve months of operation, the termination rate at the State level had reached an astonishing 47 percent.[13] The ALJs responded to this development with increasingly higher reversal rates which reached 67.2 percent by mid 1982.[14]

Second, the sheer increase in the number of cases dramatically increased the ALJ workload as appeals of termination decisions grew 86.6 percent, from 226,200 in 1979, to 422,000 in 1983.[15] In response to this crisis, ALJs were urged by the SSA to increase their productivity from 27 case dispositions per month in 1979,[16] to 45 case dispositions per month by September 1983.[17]

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[6] Social Security Disability Amendments of 1980, Disability Amendments, P.L. 96–265, Legislative History, p. 52.

[7] P.L. 96–265, 42 U.S.C. § 1305 (1980).

[8] 42 U.S.C. § 421nt, P.L. 96–265, § 304(g).

[9] 42 U.S.C. § 421, P.L. 96–265, § 311.

[10] "The Bellmon Amendment," Social Security Disability Amendments of 1980, P.L. 96–265, § 304(g) and Implementation of § 304(g) of P.L. 96–265, "Social Security Amendments of 1980, "Report to the Congress by the Secretary of Health and Human Services." Prepared by the Department of Health and Human Services, Social Security Administration, January 1982. Retained in Subcommittee files.

[11] *Supra* fn. 7.

[12] Memorandum dated March 13, 1981, from Fred Schutzwatt, Acting Deputy Commissioner (Operations) to All Regional Commissioners, Social Security Disability Insurance Program, Hearings before the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, pp. 151.

[13] Contained in SSA's May 17, 1982, response to April 27, 1982, letter from the Subcommittee, May 25, 1982, hearing record, p. 173.

[14] SSA memorandum dated May 14, 1982, from Beverly A. Bedwell, Associate Commissioner of Assessment, to the Commissioner of Social Security, May 25, 1982, hearing record p. 190.

[15] *Supra* fn. 4 at p. 70. The 1983 figure is based on an estimate provided by HHS to plaintiff ALJS in *Association of Administrative Law Judges* v. *Heckler*, CA No. 83–0124 in United States District Court for the District of Columbia. Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief, p. 7. Retained in Subcommittee files.

[16] *Supra* fn. 4 at 70–72.

[17] "Listing of FY82 (Office of Hearings and Appeals) OHA Initiatives and Objectives," hearing record p. 465.

At the same time, the SSA was also employing two controversial adjudicative policies. First, in what the SSA called an effort to achieve uniformity between the State and ALJ evaluation processes,[18] the SSA began to incorporate POMS into SSRs. POMS, which are internal agency guidelines, are not binding on ALJs; however, by incorporating the POMS into the SSRs, the SSA gives them the *de facto* force and effect of law and makes them binding upon ALJs. This has been viewed as a questionable practice because POMS are not subject to public or congressional review or comment and have differed from Federal regulations and statutes creating inconsistencies between internal SSA policy and SSA regulations.

Second, the SSA employs a policy called "non-acquiescence," [19] which prohibits agency personnel, including ALJs, from following certain Federal court decisions except in the case in which the decision was rendered. This strips the decisions of their precedential weight and value.[20] Apart from being constitutionally questionable, this policy also presents a very serious problem for the ALJs. In a case where the SSA has chosen to non-acquiesce, the ALJ must decide whether to follow the court or the agency, although he or she has a responsibility to try to follow both, and is put in the position of "trying to serve two masters." [21]

Unable to ignore these very serious problems in the system and having received a growing number of complaints from ALJs and evidence of the SSA's controversial managerial and administrative activities, the Subcommittee concluded that there was a pressing need to investigate the ALJs' allegation and the agency's adjudicative policies and practices.

The following witnesses appeared at the hearing:

Louis B. Hays, Associate Commissioner for Hearings and Appeals and Acting Director to the Deputy Commissioner for Programs and Policy, Social Security Administration;

Donald A. Gonya, Assistant General Counsel, Social Security Division, Office of General Counsel, Health and Human Services Department;

Irwin A. Friedenberg, Deputy Chief Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration;

Charles N. Bono, President, Association of Administrative Law Judges, Inc.;

Jacob Friedes, retired Administrative Law Judge, Buffalo, New York;

Victor G. Rosenblum, professor of administrative law, Northwestern University School of Law, Chicago, Illinois;

Elena Ackel, Legal Aid Foundation of Los Angeles, California, Attorney for Plaintiffs in *Lopez* v. *Heckler*; and

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[18] Memorandum dated January 7, 1982, from the Associate Commissioner of Hearings and Appeals to All Administrative Law Judges, hearing record p. 216.

[19] The exact date when this policy was first used is unknown; however, the SSA first *formally* employed the policy in 1969, when the SSA issued its first formal "ruling of non-acquiescence" regarding the case of *Rasmussen*, v. *Gardner*, 374 F.2d 589 (10th Cir. 1967). Prior to *Rasmussen*, SSA may have employed the policy without issuing a formal ruling, but without formal rulings there is no way to establish when the policy was first used.

[20] Under the legal doctrine of *stare decisis*, the rule in a case creates binding precedence for all subsequent litigants disputing the same issue.

[21] *Hillhouse* v. *Harris*, 547 F. Supp. 88, 93 (1982).

Paul Bender, professor of constitutional law, University of Pennsylvania Law School, Philadelphia, Pennsylvania.

In addition to the statements and testimony received from these witnesses, the Subcommittee also received written statements, telephone calls, letters, and other documents from Administrative Law Judges, attorneys, disability claimants, SSA state disability examiners and various organizations representing the disabled.

II. BACKGROUND

A. The SSDI Evaluation Process

In order to fully understand the role of the ALJ in the disability program, it is important to understand the context within which the ALJ functions.

The SSDI evaluation process involves two levels of government: the State level and the Federal level.[22] Pursuant to Federal-State agreements, the administration of the SSDI program is contracted out to State agencies. The State agencies have two primary functions: to secure medical and vocational information necessary to determine eligibility or continuing eligibility, and then to determine a disabled individual meets the Federal criteria for establishing eligibility.

The State disability determination service (DDS) requests medical records from the claimant's medical treaters and medical facilities. The DDS may also request that the claimant undergo a consultative examination and tests if additional medical information is needed. Based on all the medical information received from these various sources, a disability examiner, along with a DDS staff physician, makes the determination as to whether an individual is sufficiently medically disabled to qualify or to continue to qualify for benefits.

Although the State agencies administer the program, the DDS decisions are issued as that of the SSA, and the program is operated under the guidelines and auspices of the SSA. If a claimant is denied participation by the DDS, he or she has a right to file for reconsideration. At this point, the claimant may submit additional evidence. This reconsideration evaluation process is also performed by the DDS and is very similar to the initial evaluation process. If after being evaluated at the Statel level an individual is not satisfied with the result (received a denial or termination decision), a claimant may then seek recourse at the Federal level.

The first step at the Federal level is the ALJ hearing. The ALJ hearing is a *de novo* proceeding wherein a claimant may submit additional evidence, produce expert and lay witnesses and be represented by counsel. While the hearings are official judicial proceedings, they are not covered by the technical rules of civil procedure.

There is one step in the administrative process beyond the ALJ hearing at the Federal level and that is the Appeals Council. The Appeals Council is the court of last resort in the SSA's administrative process. The Appeals Council is empowered to review the ALJ's decision at its own discretion (using the criteria set out in regulations

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[22] 42 U.S.C. § § 1381–1383; and Title II of Social Security Act, 42 U.S.C. § 401 et seq.; 20 C.F.R. 404.

and referred to as review or "own-motion"),[23] at the request of the State disability office, or at the request of the claimant and may affirm, reverse or remand an ALJ's decision. A claimant has exhausted his or her administrative remedy after having appealed to the Appeals Council. If after the Appeals Council has rendered its decision a claimant is still not satisfied, he or she may seek recourse in the Federal courts.

B. The Administrative Law Judge

In 1946, recognizing a need to provide greater protection to the due process rights of persons subject to agency adjudication, Congress passed the Administrative Procedures Act (APA).[24] Prior to the passage of the APA, any designated agency employee could preside over adjudicative hearings involving the determination of an individual's rights. Thus, there was no mandatory separation between the prosecutorial and adjudicative functions of an agency. However, with the enactment of the APA, the office of the "hearing examiner" was created. [25] The APA separated the office of the hearing examiner from the agency by assigning the responsibility for the hearing examiners' selection, tenure, and compensation to the Civil Service Commission. As of January 1, 1979, the name of the Commission was changed to the Office of Personnel Management (OPM).[26] In 1972, the title of the hearing examiner was changed to "Administrative Law Judge." [27]

It is very difficult to become an ALJ. In order to qualify, a candidate must have at least seven years of legal experience, meet high standards of professional integrity and responsibility, and must enjoy a good professional and personal reputation among his or her peers.

A candidate must undergo an examination process, wherein he or she is evaluated under a 100-point rating system. Sixty of the 100 points are based on an oral and written examination, and pertain to legal skills and professional experience; 40 points are based on a peer review process. A candidate must achieve a final score of at least 80 points to be eligible.[28]

The stringency of the examination process is exemplified by the fact that in recent years the acceptance rate has been only 28 per cent.[29] However, even successful completion of the examination proc-

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[23] Pursuant to 20 C.F.R. 404.970:

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings, or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently on record.

[24] Presently codified at 5 U.S.C. § 551 *et seq.*

[25] 60 Stat. 237, 244 (1946).

[26] P.L. 95–454, Title II, §§ 201(c)(2), 202(d), October 13, 1978.

[27] 37 *Fed. Reg.* 16, 787 (1972) and P.L. 95–251, March 27, 1978.

[28] U.S. Office of Personnel Management, Announcement No. 318, "Administrative Law Judge (ALJ)," Effective March 31, 1983. Retained in Subcommittee files.

[29] Report of the Congressional Research Service, Library of Congress, "The Administrative Law Judge System," prepared by Floyd Lewis, Legislative Attorney, American Law Division, September 9, 1982, pp. 15–16. Retained in Subcommittee files.

ess does not automatically make a candidate an ALJ. In order to become an ALJ, a registered candidate must be selected by an agency which may choose an ALJ from only the top three candidates on the register.[30]

Although an ALJ is an employee of the selecting agency, he or she must remain fair and impartial and be free to exercise his or her judicial authority.[31] Thus the APA requires that ALJs:

(1) are compensated solely in accordance with the determination of the OPM;

(2) are not subject to the supervision of or performance ratings by any person having investigative or prosecutorial roles in the agency;

(3) are prohibited from engaging in an *ex parte* communication with any interested persons inside or outside the agency regarding matters relevant to the merits of a proceeding;

(4) are not to perform duties inconsistent with their responsibilities; and

(5) are, whenever possible, to be assigned cases on a rotation basis.[32]

The APA further restricts the authority that an agency has over an ALJ by setting narrow parameters for removal. In order to remove an ALJ, an agency must establish, pursuant to providing the ALJ with an opportunity for a hearing before the Merit Systems Protection Board (MSPB), that "good cause" exists for removal.[33] In the past, "good cause" has been interpreted to mean:

(1) physical disability;

(2) financial problems, which impair job efficiency;

(3) conduct either "on or off the bench" which violates the canons of judicial conduct; or

(4) reductions in work force because of fiscal reasons.[34]

The duties of an ALJ are two-fold: factfinder and decisionmaker. In conjunction with these duties, an ALJ is given much of the same judicial functionary authority as that of other Federal judges. An ALJ may, for example, administer oaths, issue subpoenas, rule upon offers of proof, receive relevant evidence, question witnesses, determine credibility, and make findings of facts and conclusions of law and decisions on the basis of reliable, probative and substantial evidence.[35]

There are currently 1,156 ALJs employed by the Federal Government.[36] of which 810, or 70 percent, are employed by the SSA.[37]

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[30] *Supra* fn. 28.
[31] 5 U.S.C. § 556(b) (1956).
[32] 5 U.S.C. §§ 557(d)(1), 3105, 5335(a)(3)(B).
[33] 5 U.S.C. 7521 (1978).
[34] Jules Gruff, Jacob A. Stein and Basil J. Mezines, *Administrative Law*, Vol. 1, Chapter 6, Supplement Prepared by George Bearese, William Hurd, Jeremiah J. Spires and Claire Pickens (1977); *Benton* v. *United States*, 488 F.2d 1017 (C&CL 1973); *McEachern* v. *Macy*, 233 F. Supp. 516 (W.D.S.C. 1964), affirmed 341 F.2d 895 (4th Cir. 1965); *Hasson* v. *Hampton*, 34 Pike and Fischer, Ad. L 2d 819 (D.D.C. 1973); and *Ramspeck* v. *Federal Trial Examiners Conf.*, 345 U.S. 128, 73 S. Ct. 570 (1953).
[35] 5 U.S.C. 556(e) (1976).
[36] *Supra* fn. 29 at 12.
[37] "Office of Hearings and Appeals Full Time Permanent Staff on Duty End of Year," May 25, 1982, Subcommittee hearing record, p. 168.

C. The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program

Within the context of an SSDI administrative proceeding, the ALJ occupies a very unique and significant role for several reasons. First, until recently, the ALJ was the first agency personnel in the review process who had an opportunity to interview the claimant in person. Thus, the ALJ was the only agency official able to visually assess the "human element" in a case.[38]

Second, although the hearing is an official judicial proceeding, it is a non-adversarial proceeding (the SSA is not represented at the hearing), and the ALJ is afforded a great deal of procedural latitude. The ALJ has the authority to request additional testimony of medical and vocational experts and lay witnesses, and receive firsthand information and explanations on issues relevant to the claimant's condition or case.[39] Finally, the ALJ has the responsibility of making a decision based on the hearing record developed throughout the proceedings. If accepted by the agency and not appealed to the Appeals Council, this decision becomes the final decision of the agency.[40] Therefore, in the adjudicative process, the ALJ plays a key role because he or she has the opportunity to define the issues, collect and structure the evidence, justify the decision, and propose the administrative remedy.

D. Inconsistencies Between Levels of Evaluation

As indicated earlier, there are significant differences between the State disability examination process and the ALJ adjudicative process. These differences fall into two categories; (1) the type, quantity and quality of information available to form the basis for disability determinations; (2) the guidelines governing the interpretation and evaluation of the information gathered.

The State disability examiners must make their determination based only upon written reports, while the ALJs have the benefit of firsthand testimony from the claimant and various medical and vocational experts and lay witnesses. While State disability examiners are bound by the POMS and, therefore, are required to adhere to and implement agency policy which may in fact be more stringent than Federal regulations,[41] ALJs are not found by the POMS but are required to apply the law as defined by the Federal courts, statutes, regulations, and the the SSRs.[42]

In describing these discrepancies, the SSA indicated in its report on the results of the Bellmon Review that:

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[38] As of October 1982, the SSA began to provide a personal interview in the local SSA district offices for beneficiaries subject to CDI reviews. This is for the purpose of explaining to the beneficiary the nature of the CDI process and the responsibility he or she faces in order to maintain eligibility. Also, in legislation passed on January 12, 1983, P.L. 97–455, the SSA is required to establish procedures for a face-to-face evidentiary hearing at reconsideration by January 1, 1984. This will be discussed later in the report.

[39] 20 C.F.R. §§ 404.944, 404.946, 404.948, 404.949, 404.950 and OHA Handbook, Section A–142, 143.

[40] 5 U.S.C. 557(b) (1976).

[41] See Section III, C, 1. infra.

[42] *Supra* fn. 10.

> An examination of the standards and procedures governing the ALJs and DDS indicate distinct differences. In certain instances, operational definitions were not identical. In other instances, ALJ procedures permitted a finding of disability that was not possible under the DDS standards. Finally, in some areas the definitions contained in the standards are the same but procedures differ for evaluating evidence of impairment.[43]

The most significant and obvious consequence of these inconsistencies is the differences in the outcome of cases as evaluated at the two levels. If a claim is denied at the State level and subsequently appealed, it currently stands more than a 50 percent chance of being allowed at the ALJ level.[44] In the three years prior to 1982, the ALJ allowance rate (the term used for the rate at which the ALJs allow cases which State disability examiners deny) [45] steadily increased. In 1979, the allowance rate was 59.5 percent,[46] and by mid-1982, it peaked at 67.2 percent.[47] However, by late 1982, the allowance rate began to decline where it currently stands at 51.9 percent.[48]

The most distressing aspect of this problem is that the claimant is caught in the middle, or as characterized by Senator Levin:

> There is something wrong with a system where the decisionmakers, when presented with the same facts, generate contradictory decisions, where the State disability offices are doing one thing and the ALJs are doing another, where the outcome of your case often rests more upon the stage in which your case is being evaluated, rather than your actual medical condition and ability to work.[49]

The SSA has focused its concern for the adjudicative inconsistencies on the role played by the ALJs. Many Members of Congress, on the other hand, have been more concerned with the overall lack of uniformity in the program and desire to ensure that the outcome of a case is based solely upon the nature and extent of the claimant's condition, rather than the level at which a claim is evaluated.

In 1980, Senator Henry Bellmon sponsored an amendment to the Social Security Disability Amendments of that year which provided the following:

> (g) The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, *decisions* rendered by administrative law judges as a result of

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[43] *Supra* fn. 10, "Executive Summary" at ii.

[44] In the ten-year period between 1972 and 1982, the ALJ reversal rate increased almost 75 percent from approximately 40 percent to nearly 70 percent. Thus, there was increasing disparity between the outcome of cases adjudicated at the state and ALJ level. However, in the last year and a half the ALJ reversal (allowance) rate declined, and as of the end of the third quarter for FY83, the ALJ allowance rate was 51.9 percent.

[45] It is synonymous with the term "reversal rate," or the rate at which ALJs reverse decisions of state disability examiners.

[46] *Supra* fn. 4 at 57.

[47] *Supra* fn. 14.

[48] Based on information obtained from the National Office of Hearings and Appeals, as of June 1983. Documentation retained in Subcommittee files.

[49] Hearing record p. 5.

> hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress. [Emphasis added.]

There is very little legislative history on the Bellmon Amendment. It was offered as an unprinted floor amendment by Senator Long on behalf of Senator Bellmon, who simply introduced the amendment and submitted the written statement of Senator Bellmon for the record. The amendment was accepted by the Senate without debate.

According to Senator Bellmon's statement, the SSA was to review the allowance decisions of those ALJs with high allowance rates.[50] In addition, as passed by the Senate, the amendment not only required the Secretary of Health and Human Services (HHS), to report to Congress on the progress of the program, but outlined what was to be considered and included in the report:

> In his report [the Secretary] must indicate the percentage of decisions being reviewed and describe the criteria for selecting decisions to be reviewed and the reversal rate for individual administrative law judges by the Secretary (through the Appeals Council or otherwise), and the reversal rate of State agency determinations by individual administrative law judges.[51]

However, when the amendment was taken up for review by the Conference Committee, the Committee struck all language specifying what was to be included in the report to Congress. Thus, *the Conference Committee struck all references to the assessment and evaluation of the ALJ reversal rate* and simply required that the SSA review ALJ decisions and report on that review.[52] There was no mention in the amendment itself or the legislative history (but for the introductory statement of Senator Bellmon) that the SSA should focus on allowance decisions or target only ALJs with high allowance rates. Nevertheless, the SSA has repeatedly insisted that it was the intent of Congress to focus the review on only ALJ allowance decisions of those judges with the highest allowance rates.[53]

The Subcommittee requested that the SSA provide documentary evidence and support for its interpretation of the legislative intent behind the Bellmon Amendment. The Subcommittee received from the SSA only a copy of Senator Bellmon's statement which has already been discussed. Thus, in formulating its interpretation of the legislative intent regarding the Bellmon Amendment, the SSA ignored the language of the amendment itself and the changes made by the Conference Committee when it reviewed the amendment.

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[50] United States Congressional Record, December 13, 1980; S. 119, 120, January 31, 1981.
[51] *Supra* fn. 6 at p. 51.
[52] Id.
[53] See the testimony of Louis B. Hays before the House Way and Means Committee, Subcommittee on Social Security, October 23 and 28, 1981, Hearing Record, p. 3; *supra* fn. 12, Executive Summary at 1; Memorandum dated September 24, 1982, from Associate Commissioner, Office of Hearing and Appeals, Louis B. Hays, to all ALJs entitled "Description of the Bellmon Own-Motion Review Program—INFORMATION." Retained in Subcommittee files; *Association of Administrative Law Judges, Inc.*, v. *Schweiker*, *supra*. Memorandum of Points and Authorities in Support of Motion to Dismiss by Defendants Schweiker, Svahn, Hays and Brown at pp. 5–6, and HHS Defendants' Statement of Material Fact As To Which There Is No Genuine Issue. Hearing record, p. 451.

III. THE SOCIAL SECURITY ADMINISTRATION'S RESPONSE AND POLICY

A. Managerial Focus on the ALJ Allowance Rate

Implementing its misperception of what Congress required under the Bellmon Amendment, the SSA devised a review program which focused primarily upon ALJs with high allowance rates. According to the Bellmon Report, the Bellmon Review was divided into two stages: (1) the "initial review" and (2) the "ongoing review."

The initial review consisted of 3,600 ALJ allowance and denial decisions, which were reviewed by two different units in the SSA: the Office of Assessment, which followed the standards governing the DDS, and the Appeals Council, which applied the standards governing ALJ decisions. The units made new decisions without knowledge of the original ALJ decisions or the decision of any other reviewing body. These decisions were used only for analytical purposes and did not change the original ALJ decision.

The major finding of the initial review was that significantly different decisions resulted even though decisionmakers were given the same evidence on the same case. While ALJs allowed 64 percent of the cases, applying ALJ's standards, the Appeals Council allowed 48 percent, using the same standards and the Office of Assessment, applying DDS standards, allowed 13 percent of the cases. Most significantly, however, the review indicated that the personal appearance of the claimants had a significant impact on the ALJ decisions. Thus, the report on the initial review confirmed the hypothesis that inasmuch as there were "distinct differences" between the standards and procedures governing the ALJ and the DDS, the decisions rendered by the ALJs were not wrong, but just different, based on different criteria, and evaluated with different procedures.

Despite these findings, the SSA decided to focus its "ongoing review," initiated on October 1, 1981, on ALJs and hearing offices with the highest allowance rates, and review only the allowance decisions of these judges. This initial effort was intended to cover 7½ percent of all ALJ SSI [54] and SSDI allowance decisions. The SSA conducted this review with the stated intent of "*bringing about more accurate and consistent decisions by all administrative law judges.*" [55]

The SSA's justification for this practice of focusing on only the allowance decisions of only high allowance judges is two-fold. First, the SSA says that it was mandated to do so by the Bellmon Amendment, which it was not. Second, the SSA says that as a result of the initial review conducted as part of the Bellmon Review, the SSA determined that allowance decisions of high allowance judges are more prone to error than allowance decisions of low allowance judges.[56] The standard for determining error was the rate at which the Appeals Council takes action (which may include remand but not necessarily

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[54] The Supplemental Security Income program (SSI) (42 U.S.C. § 1382) provides financial assistance to the needy aged, blind and disabled without regard to their previous work experience.

[55] *Supra*, fn. 10.

[56] SSA post hearing responses to the Subcommittee's additional inquiries, hearing record p. 258; and memorandum entitled "Description of the Bellmon Own-Motion Review Program—INFORMATION," dated September 24, 1982, from the Associate Commissioner, Office of Hearings and Appeals, Louis B. Hays, to all ALJs, hearing record p. 204.

reversal) on an ALJ decision.[57] Senator Cohen, in his questions to the SSA at the hearing, pointed out the problem with using the Appeals Council action as the yardstick for error.

> Senator COHEN. But it may not be an error. In other words, it may not be an error as far as the ALJ is concerned. He made a decision. The Council decides to review it, and it may reaffirm it. That doesn't determine whether it's right.[58]

But the standard for error aside, what became clear at the hearing through the questions of Senator Cohen and Senator Levin was that the SSA did not attempt to determine the error rate for denial decisions as it had for allowance decisions. During Senator Cohen's questioning of Mr. Hays on this issue, the following exchange occurred:

> Mr. HAYS. I'm sorry, sir, but what I tried to explain was that what we are having difficulty in collecting from the antiquated computer system is information on what happens with an individual administrative law judge's denial decision that is being reviewed by the Appeals Council.
>
> Cumulatively, we have the data as to what happens before the Appeals Council with all of the cases that come before it.
>
> Senator COHEN. So you don't have the records as far as what happens to a case when disability has been denied? But you do have the information on those in which disability has been granted and the Council then exercises on its own motion a review of the 15 per cent of allowances; you do have that information?
>
> Mr. HAYS. What I do not have is the individual percentages for each administrative law judge of how many of their denial decisions are in fact taken by the Appeals Council. That is what I do not have.[59]

A little later in the hearing, Senator Levin emphasized the same point in his questioning of Mr. Hays.

> Senator LEVIN. . . . A number of times you weren't quite clear in your testimony this morning. In response to a number of questions you would just simply say 'there's a higher probability of error in the decisions of ALJs with high overall allowance rates.' You didn't mean that. You meant what your written testimony says, I gather? That is, your information indicates that there is a higher probability of error in the favorable decisions of ALJs with higher overall allowances rates, because your antiquated equipment hasn't been able to tell us about the probability of error in unfavorable decisions of ALJs. Is that correct?
>
> Mr. HAYS. What this statement says, and I believe what I testified to verbally, was that both the Bellmon study that is referred to on page 3 of my statement and the ongoing Bellmon own-motion review have indicated that administrative law judges with unusually high allowance rates do have a greater likelihood of error in those allowance decisions.

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[57] Id.
[58] Hearing record, p. 29.
[59] Hearing record, p. 28.

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Senator LEVIN. Only in the favorable decisions. That's what you said on page 3, right?

Mr. HAYS. Yes, that's right.

Senator LEVIN. Your antiquated equipment has not yet been able to tell us whether that's true of what you would call their unfavorable decisions or denials.

Mr. HAYS. With respect to an individual administrative law judge, that is unfortunately the case.

Senator LEVIN. It's unfortunate that your antiquated equipment could analyze judge-by-judge who has a higher error rate relative to what you call the favorable decisions, or the allowances, but your same antiquated equipment can't give us a judge-by-judge analysis relative to the denial of ALJs.[60]

The SSA, at the time it initiated the ongoing review, did not have the full picture of ALJ decisionmaking; its information was limited to only allowance decisions. And yet it established its selection process for ALJs to be reviewed based on this incomplete data base. In response to Senator Levin's inquiry as to why the SSA did not have comparable statistics on ALJ denial decisions, Mr. Hays responded that he had to be able to get the information on allowance decisions to comply with the Bellmon Amendment.[61] The Subcommittee disagrees with this rationale in light of the earlier discussion on the legislative history of the Bellmon Amendment.

Moreover, Mr. Hays admitted at the hearing that review solely of the ALJ allowance rate reveals very little. The full discussion on that point was as follows:

Mr. LEVIN. . . . Do you consider that a trend to a lower reversal rate—which means more denials—we've established that at the beginning of our questions—to be a more favorable trend?

Mr. HAYS. It could be a favorable trend.

Senator LEVIN. Could it be an unfavorable trend?

Mr. HAYS. I suppose it could be.

Senator LEVIN. We don't know whether it's favorable or unfavorable. It may or may not be in and of itself. We can't determine that it's a favorable trend; would you agree with that?

Mr. HAYS. I think it depends on the quality and accuracy of those decisions. If those decisions that go into an increasing or decreasing allowance rate are accurate, correct decisions, then it's a good trend. If the decisions are not accurate and of good quality, then it's a bad trend.

Senator LEVIN. So, in and of itself, the trend to lower reversal rates, which means more denials by ALJs, is not a favorable trend; you'd have to look behind it.

Mr. HAYS. Looking solely at an allowance rate tells you very little.[62]

Further, the high allowance ALJ selected for the ongoing review in October, 1981, had not been reviewed on an individual basis for

[60] Hearing record, p. 31.
[61] Hearing record, p. 32.
[62] Hearing record, pp. 34, 35.

their so-called error rates.[63] The ongoing review included in its sweep all high allowance judges regardless of the rate at which the Appeals Council took action on the individual ALJs' decisions. The selection process was thereby prejudicial and has served to undermine an impartial system of justice.

Included in the initial ongoing review were 110 ALJs.[64] Forty-six of these ALJ were removed from the review when the SSA changed its selection policy to reflect the own-motion rate of the ALJs instead of the allowance rate.[65] This occurred in April 1982, when the ongoing review was restructured to include 15 percent of the ALJ allowance decisions and to change the method of selection for individual ALJs.[66] Individual ALJs were to be selected (and currently are selected) for review based not on their allowance rate, but on their so-called error rate or own-motion rate (the frequency with which the Appeals Council takes action on an ALJ decision). Three other groups were also added: a national random sample of all ALJ allowance decisions, all the allowance decisions of new ALJs, and ALJ decisions protested by disability examiners in the SSA's Office of Disability Operation.[67]

While individual ALJs are no longer to be selected for review based on their allowance rate, those ALJs already on review for their allowance rate will remain under review until their own-motion rate equals the average of the random sample.[68] And, allowance decisions are still the only decisions reviewed in all four categories.[69]

When asked by the Subcommittee to describe the effects of the Bellmon Review on ALJs subject to such review, Charles Bono, President of the Association of Administrative Law Judges, Inc., an organization which represents over 65 percent of the SSA ALJs,[70] said:

> . . . Being advised that you have been selected for Bellmon review on the basis of your allowance rate is obviously objectionable. It communicates the charge to the judge that something is wrong with his or her rate of allowance. Additionally, the Associate Commissioner has, in the past, indicated they have found the high allowance judges' decisions are more decisionally defective. Therefore, being selected on that basis also communicates to the judge that his decisional product is more defective than others. Being a "targeted judge" is in many respects an unfavorable reflection on the judge, and he is certain to feel prejudiced by it.
>
> Additionally, the management of his cases by the agency is different than those of non-Bellmon study judges. He is under 100 percent scrutiny and all of his cases are subject to pre-effectuation review. Judges who are not under the Bellmon study have no such pre-effectuation review. The result

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[63] SSA post hearing responses to the Subcommittee's additional inquiries, hearing record, pp. 255, 256, 257.
[64] SSA pre-hearing responses to the Subcommittee's inquiries, hearing record, p. 163.
[65] Id.
[66] Memorandum entitled "Implementation of the Feedback Process in OHA's Ongoing Bellmon Review—INFORMATION," dated October 4, 1982, from the Associate Commissioner, Office of Hearings and Appeals, Louis B. Hays, to Regional Chief ALJs, hearing record, p. 200.
[67] *Supra* fn. 56.
[68] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 248.
[69] *Supra* fn. 56.
[70] Information provided by Administrative Law Judge Charles Bono, President of the Association of Administrative Law Judges, Inc.

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is that the claimants who come before the "targeted Judge" are not afforded as speedy a decision effectuation as those who come before a non-targeted judge.

This disparate treatment of one class of judges, as compared to another, deprives the claimants who appear before them of the equal protections and immunities of the law, and due process.

This realization is predictably resulting in pressures on the "targeted" ALJs to do whatever they can to remove themselves from this special scrutiny.

A basic objection is that under this system the agency has established a method to rate and evaluate the general performance of an administrative law judge, which practice is contrary to the provisions of the Administrative Procedures Act. At the same time such a rating and evaluation of non-targeted judges is not happening. The message is clearly conveyed that if a judge is selected for Bellmon review, he has every reason to believe that certain standards and criteria are being applied to his work product by the agency, while others escape such pressures.[71]

In addition to the bias in the selection process for Bellmon Review, the SSA emphasizes its concern over the ALJ allowance rate in a number of other ways. The SSA keeps statistics on each individual ALJ's allowance rate. Lists of the ALJs by region, ranked according to allowance rate, are circulated to the field offices.[72] While, according to the SSA, the official circulation of these lists is intended to be limited to those in supervisory positions,[73] they are nonetheless a statement of agency preference in ALJ performance.

The SSA's preoccupation with lowering the ALJ allowance rate (i.e., reversal rates) has been evidenced in numerous memoranda.

In a memorandum entitled "Individual Reversal Rates," from Ralph F. Ives. Jr., the then-Acting Director of the Office of Management Coordination, to Louis Hays, Mr. Ives made the following statement:

> . . . What we would like to see is a decrease in the variance in ALJ reversal rates *as well as a shift to lower reversal rates indicating more uniformity within the SSA process.*
>
> . . . The results in the second quarter of FY 1982 were much more favorable. While there was not a decrease in the variance among reversal rates the general trend was to *lower reversal rates.* . . . [Emphasis added.][74]

In a memorandum entitled "FY81 Workload and Comparison to FY80," dated December 16, 1981, from Louis Hays to all ALJs, the following statement was made:

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[71] A letter dated June 16, 1983, from Administrative Law Judge Charles Bono to the Subcommittee. Retained in Subcommittee files.

[72] Retained in Subcommittee files; see also SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 246.

[73] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 246.

[74] Hearing record, pp. 33, 35.

> . . . The average allowance rate based on total dispositions declined from 55.8 percent to 55.2 percent. The average allowance rate based on decisions declined from 61.8 percent to 61.3 percent. *This represents the first decline in the annual allowance rate since fiscal year 1974.* . . . [Emphasis added.] [75]

And in a memo from the Director of the Office of Appraisal to Louis Hays, entitled "Production Among Bellmon Targeted ALJs; Processing Time and Pending Case Data of OHs With At Least Two Targeted ALJs," dated June 9, 1982, the following observations were noted:

> . . . Comparative Production/Reversal Rate Data: The chart below provides an "at-a-glance" comparison of monthly production statistics from two pre-Bellmon periods (April 1981 and July 1981) and three Bellmon periods for the original 66 targeted ALJs.

Month	Total dispositions	Number of reversals	Reversal rate (percent)
April 1981	1,896	1,393	74
July 1981	2,004	1,430	71
October 1981	1,972	1,380	70
January 1982	1,598	998	63
March 1981	1,939	1,243	64

> Although total dispositions for January were significantly below the totals shown for the other months, by March, total production from this group was 97 percent of the 2,004 dispositions issued during July 1981. By contrast, the reversal rate in March was percent lower than in July. *Also, we believe it is significant to note that this group of ALJs produced more dispositions in March 1982 than they did in April 1981, with a reversal rate drop of 10 percent.* . . . [Emphasis added.] [76]

The SSA also attempts to make new ALJs conscious of their allowance rates by encouraging a restrictive view in evaluating cases. When an ALJ is hired by the SSA he or she must undergo an initial training program designed to educate the new ALJ on how to properly evaluate and decide cases. These training sessions take six weeks, and during these sessions, the new ALJs evaluate hypothetical cases and do mock hearings. In preparing for the hearing, the Subcommittee questioned Joyce Krutick Barlow, a new ALJ, about her experience in the training program. Responding to the Subcommittee's inquiry, Judge Barlow stated:

> . . . On my second day as an administrative law judge, my "class" was addressed by Rhoda Greenberg, then Director of the Office of Disability Programs. In her remarks, she informed us that the State agencies were correct 95 percent

[75] Hearing record, p. 224.
[76] Hearing record, p. 214.

> of the time. I, along with many other Judges felt that this was, in effect, a statement that most claims deserved to be denied. . . . Throughout the orientation session, the lecturers, while imparting their vast knowledge of the law and regulations . . . argued with us in mock cases, *attempting to convince us that they [the hypothetical claims] should not be granted.* . . . [Emphasis added.] [77]

In addition, as stated earlier, new ALJs are also placed on Bellmon Review until their decisions are "satisfactory" or "roughly equal to or lower than the average own-motion rate as determined by the national random sample portion of the Bellmon Review." [78]

Finally, the Subcommittee is also concerned that in the past two and one-half years, the SSA has conducted more than 30 studies and reviews on the ALJs allowance rates, productivity and decisional quality.[79] This is in striking contrast to the years prior to 1980, when according to the SSA's own information, it conducted no such studies or reviews.[80] The Subcommittee believes that the message conveyed by the SSA's recent preoccupation with ALJ performance is clear: there is something wrong with the ALJs' performance, and even though the SSA is prohibited by the APA from giving ALJs performance ratings, it is going to study and review the ALJs' performance until it is satisfactory to the SSA. This message is forcefully sent to the ALJs who justifiably feel that they are under constant scrutiny.[81]

B. Focus on Increasing ALJ Productivity

As a part of the SSA's preoccupation with the ALJ allowance rate, the SSA has also been very concerned with the ALJs' productivity.

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[77] Written statement of Administrative Law Judge Joyce Krutick Barlow, hearing record, p. 295.

[78] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record p. 248.

[79] A listing of these studies and reviews include: Key Workload Indicators Report—Prepared monthly and for total fiscal year beginning FY80; ALJ and Hearings Office Statistics—Prepared Annually for FY81 and FY82; OHA Case Control Systems Reports: OHA–CCS–014—Production Report Administrative Law Judges, OHA–CCS–036—Hearing Office Disposition by Physical Location, OHA–CCS–048—ALJ Quarterly Production, OHA–CCS–100—Quarterly Report of Hearing Office Workload, and OHA–CCS–118—Historical Report of ALJ Reversal Rates, Excluding Dismissals; Production Among Bellmon Targeted ALJs; Processing Time and Pending Case Date for HOs with at Least Two Targeted ALJs; Characteristics of the "Ideal" Hearing Office, FY80. Study of the Effect of Staff Attorney Support on ALJ Decisional Quality; Disposition Rates and Reversal Rates, FY82: State-by-State Breakdown of ALJ Receipts and Dispositions for [the] Last 3 Quarters of FY82; Report on Special Case Study to Examine ALJ Compliance With Current CDI Policy; Data on ALJ Compliance with Currrent CDI Policy through the Bellmon Review; Report on the "Uniformity of Disability Allowance Rates (Reversal Rates) Among Administrative Law Judges; "Data on ALJ Compliance with the New CDI Policy through the Bellmon Review; Individual ALJ reversal rates; Report on Quality Review for October through December 1980; Processing Time Profile; Follow-up Review of Selected Low Allowance Rate ALJ Decisions; Ongoing Report of Study of OHA Standardized Test Guide; Study of ALJ Allowance Decisions (in Disability Claims) That Do Not State the Specific Regulatory Basis for the Favorable Conclusion; Hearing OH Profile FY80; Utilization of Vocational Experts, FY81; Study of Outcomes of Remand Cases—Policy on ALJ assignments in Remanded cases; Utilizations of Medical Advisors, FY81; Monitoring the Usage and Performance of Vocational Experts; Implementation of Section 304(g) of Public Law 96–265 "Social Security Disability Amendments of 1980." Report to the Congress by the Secretary of Health and Human Services, January 1982; and Medical Advisor Usage. Most of these reports and studies are retained in the Subcommittee's file, and some may be found in the hearing record. Still others have been retained by the SSA. This list is not exhaustive.

[80] A review of the reports and studies listed in footnote 79 reveals that although the Subcommittee requested that the SSA provide it with all of the studies on ALJs undertaken in the past five years, based on the information provided by the SSA, the SSA did not conduct any studies on ALJs from 1977 to 1980.

[81] See *Association of Administrative Law Judges, Inc.* v. *Schweiker, Supra*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction. Retained in Subcommittee files.

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> . . . The average allowance rate based on total dispositions declined from 55.8 percent to 55.2 percent. The average allowance rate based on decisions declined from 61.8 percent to 61.3 percent. *This represents the first decline in the annual allowance rate since fiscal year 1974.* . . . [Emphasis added.] [75]

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[75] Hearing record, p. 224.
[76] Hearing record, p. 214.

Although the ALJs have almost tripled their output from 14 case dispositions per month in 1974,[82] to 40 case dispositions per month by March of 1983,[83] ALJs have been unable to keep abreast of the ever-increasing caseload, and the SSA remains dissatisfied with their efforts.

The demands by SSA for increased productivity can sacrifice the quality of the ALJ's decision and therefore limit the right of the beneficiary to a fair and full hearing. According to the Supreme Court in *Heckler* v. *Campbell*, 461 U.S. 81–1983, May 16, 1983, the Court, quoting from an Eleventh Circuit case stated:

> There is a "basic" obligation on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a "special" duty . . . *to scrupulously and conscientiously explore all relevant facts where an unrepresented claimant has not waived counsel. Broz* v. *Schweiker*, 766 F.2d 135, 1364 (Call 1982) [Emphasis added].[84]

Thus, the ALJ must be afforded enough time to research and investigate a case and must be given enough time to develop and examine all of the evidence that is available. However, as ALJs are pressured to increase their productivity, they are forced to devote less and less time to each case and less and less time to the development of pertinent evidence. This is particularly harmful in view of the fact that many of the claimants that appear before the ALJ are unrepresented, and thus, the ALJ has the sole responsibility to ensure that all the necessary evidence is in the claimant's file and has been reviewed before he or she renders a decision. As ALJs are forced to process more and more claims, faster and faster, it is inevitable that the claimant's right to a full and fair hearing is being jeopardized. According to most ALJs, because of the pressure being placed upon them by the SSA, the rights of the disability claimants have already been compromised, and the quality of their decisions reduced.[85]

Pressure to increase the disposition rate manifests itself in several ways. First, there are memos to the ALJs, such as the February 3, 1983, "Productivity" memo from L. Charles Leonard, Regional Chief ALJ for Region II, to all ALJs In Charge:

> Productivity in the months of December and January was far from what we would like and what we as a Region are capable of doing. I realize that holidays, extensible leave in the absence of a declared exigency, the hiring freeze, and processing backlog have all contributed to this situation. However, I look forward to a significant improvement in the month of February . . .
>
> At the end of fiscal year 1982, our Region averaged more than the 40 dispositions per ALJ which the Associate Commissioner sought as a goal if we were to keep pace with ever-increasing receipts. From the month of February through the

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[82] *Supra* fn. 4.

[83] Memorandum entitled "March Results," dated April 4, 1983, from Louis Hays sent to all ALJs. Hearing record p. 184.

[84] *Heckler* v. *Campbell*, 461 U.S. —, [no page number available at the time of the printing of this report] No. 81–1983, May 16, 1983.

[85] See SSA ALJ Opinion Survey conducted by Professor Donna Price Cofer of Southwest Missouri State University, 1982, Section 5, Question 6. Retained in Subcommittee files.

> rest of fiscal year 1983, we should make an effort to build up to a *minimum of 45* dispositions [per month] per ALJ. . . . [Emphasis added.] [86]

And the July 1, 1982, "Quantity Quality and Integrity" memo the Regional Chief ALJ for Region X included the following:

> *First of the three goals addressed by Lou Hays was quantity.* The pending caseload increases every month, i.e., April 143,323 and May 144,400. Although dispositions increase every month they tend to stay about 1,000 behind receipts. Projections are for a pending [caseload] of approximately 200,000 cases by mid-1984.
>
> The production goal is for a disposition rate per ALJ of 40 [per month] by the end of FY82 (9–30–82) and 45 each by the end of FY83 (9–30–83).
>
> Twenty-five percent of all ALJs have already reached the goal of 45 [case dispositions] per month. There are approximately 782 ALJs on board so we are talking about 195 plus. This does not represent a lunatic fringe but a substantial number of ALJs who are meeting the goals. . . . [Emphasis added.] [87]

In addition, the message of the SSA's expectations regarding the productivity of its ALJs was clearly outlined in a December 29, 1981, memo from the Director of the Office of Appraisal to Louis Hays, entitled, "Characteristics of the 'Ideal' Hearing Office FY 80," which stated in part that:

> . . . According to the data for FY80, the most effective of our hearing offices is characterized by an average disposition rate of 45 cases per month . . .
>
> *The least effective of our hearing offices is characterized by an average disposition rate of 20 cases per month* . . . [Emphasis added.] [88]

These memos contradict the statements made at the Subcommittee hearings by Louis Hays when he said:

> As I previously mentioned, *we have no goal or quotas for individual ALJ productivity.* [Emphasis added.] [89]

He went on to prove just what he had denied:

> . . . However, all SSA employees. including ALJs, are required to perform at a minimally acceptable level of efficiency and proficiency, and to work to the full extent of their capabilities. In order to achieve this end, the Chief Administrative Law Judge monitors the productivity of the ALJs. This is an ongoing process and periodically those ALJs whose production averaged 20 or fewer final dispositions per month for at least 6 months are put on notice by the Chief Administrative Law Judge that their decisional output was considerably be-

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[86] Retained in Subcommittee files.
[87] Hearing record, p. 343.
[88] Hearing record, p. 222.
[89] Hearing record, p. 17.

low the norm established by their peers. They are asked to improve their productivity and to advise their respective Regional Chief Administrative Law Judges of any assistance they require to improve their productivity.[90]

Second, in an exchange between Senator Cohen and Mr. Hays during the hearing, Mr. Hays made the following statements:

Senator COHEN. I have a document which says, "OHA initiatives and objectives." Item No. 4 on this particular document says, "Achieve a disposition rate of 40 per month per judge by September 1982, 45 per month per judge by September 1983."

Now, what does that mean?

Mr. HAYS. I do not know specifically what that document is. But as I stated, I have what, in effect, is my personal goal, my personal expectation, that on the average our administrative law judges will accomplish levels in that range. I have further——

Senator COHEN. Wait a minute. What do you mean, your personal goals? Where did you get these personal goals? Did you check with the administrative law judges?

Mr. HAYS. Yes, as a matter of fact.

Senator COHEN. And they thought they could double their caseload?

Mr. HAYS. Given the fact that we were making substantial increases in the support staff to assist the administrative law judges; given the fact that we were doing such things as for the first time providing state-of-the-art word processing equipment for all of our hearing offices; given those sorts of initiatives, given more resources to administrative law judges; all of those things together with the other important ingredient of the motivation and professionalism of the administrative law judges, we thought those sorts of results could be achieved. And, in fact, we are seeing results such as that.

I have further stated publicly that, in my opinion, it is very difficult to envision ever seeing an average disposition rate for our corps of administrative law judges go beyond the 40 to 45 level, and that if the number of hearing receipts continues to increase and if the number of pending cases continues to increase, then the only solution will be to hire additional administrative law judges and additional support staff.[91]

However, contrary to Mr. Hays statement, on at least three separate occasions, SSA officials, including Mr. Hays, have directly and indirectly indicated that they expect that the ALJs may be able to achieve a disposition rate as high as 60 cases per month. First, in a 1981 Government Accounting Office (GAO) report,[92] the GAO reported that a deputy chief ALJ referring to the "OHA Office Reconfiguration" (to be discussed later in this report) indicated that he believed that "the experiment [would] show that each ALJ will be able

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[90] Hearing record, p. 17.
[91] Hearing record, p. 24.
[92] Report to Senator Max Baucus, prepared by the U.S. General Accounting Office, June 2, 1981, Subject "Social Security Administration Policies for Managing Its Administrative Law Judges." (HRD–81–91) Retained in Subcommittee files.

to hear 60 cases per month." [93] Second, in a May 1981 memo from the Regional Chief ALJ for Region X Doris Coonrod, regarding "April 1981 Production," ALJ Coonrod made the following statement:

> I am extremely pleased to announce that Judge George Wise set a new record in the region for month dispositions. He and his staff processed 60 dispositions in the month of April. He is to be congratulated for his achievement.[94]

And, finally, in a December 1981 memo from Mr. Hays to all ALJs, regarding "Hearing Office Reconfiguration," Mr. Hays stated:

> . . . The purest application of this concept of functional organization is in the Des Moines Hearing Office. During the experimental period of October 1980 through July 1981, the office staff consisted of five ALJs, two staff attorneys, five hearing assistants, nine clericals, and a hearing office manager. . . . Although the support staff ratio subsequently increased, the monthly disposition rate is now average about 60 cases [per month, per ALJ] . . .
>
> I have been impressed with these results and have concluded that this approach is a valid one that should be employed in offices where performance needs improvement to meet the challenge of the ever-rising caseload.[95]

Thus, contrary to the indications of Mr. Hays in his testimony before the Subcommittee, it is clear to the Subcommittee that ALJs cannot expect SSA demands regarding their productivity to disappear once they have achieved the 45-case disposition goal, but rather ALJs may expect the SSA's productivity goals and pressure to attain those goals will continually increase in direct relationship to the number of requests the SSA receives for ALJ hearings.[96]

In addition to pressuring the ALJs as a group to achieve certain levels of productivity, as indicated earlier in Mr. Hays' testimony, pressure to achieve high productivity is sometimes focused directly on an individual ALJ. In addition to having the Chief ALJ talk to those ALJs whose productivity is low, as mentioned by Mr. Hays, the SSA also sends special memos to individual ALJs who appear to need special motivation. These memos are called "low producer memos." [97]

> Between June and December of 1980, 28 ALJs received letters from their respective regional chief ALJ soliciting ways management could assist them in improving their productivity. An additional four ALJs were counseled by their regional chiefs. These 32 ALJs had average production rates of 20 or fewer cases per month for the six-month period between September 1979 and February 1980. OHA central office prepared the list and distributed it to the regional chief ALJs." [98]

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[93] Id. at p. 7.
[94] Retained in Subcommittee files.
[95] Hearing record, p. 226.
[96] Based on statements made by Louis Hays before the House Social Security Subcommittee in October 1981. See *supra* fn. 4, page 72.
[97] *Supra* fn. 93 at 5.
[98] Id.

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According to the SSA, "the intent of the letters was only to solicit methods to improve productivity." [99] However, some of the targeted ALJs did not feel that way.

> One ALJ who received a letter filed a grievance with OHA. He believed that, although it did not constitute a performance rating the letter threatened punitive action by requiring him to improve his processing [time] or defend his current level of production.[100]

The SSA's efforts to increase ALJ productivity have not stopped at memos and counseling. Indeed if after the memos and counseling an ALJ still does not respond, formal disciplinary action, including procedures for removal, are instituted against the ALJ in question. Over the past five years, of the 21 removal or suspension actions instituted against ALJs by all government agencies, 16 were instituted by the SSA.[101] There are several disconcerting aspects to this fact. First, the SSA is the only agency to have ever instituted a removal action against an ALJ because of low productivity, even though ALJs in other government agencies dispose of far fewer cases.[102] Second, in the past three years, the SSA has instituted more removal actions against ALJs than all of the other agencies have instituted against ALJs since the establishment of the ALJ corps.[103]

In three recent cases before the MSPB, the SSA argued that the ALJs' inability or refusal to dispose of more than 20 cases per month over a 12-month period was indicative of substandard performance and that substandard performance was tantamount to incompetence and therefore within the province of the definition of "good cause," meeting the necessary criteria for removal.[104] The MSPB ALJs who presided over these actions agreed with the SSA's arguments in 2 of the cases and concluded that 20 case dispositions per month was an acceptable minimum standard of performance. Once case was dismissed pursuant to the ALJ's retirement. The two remaining actions are currently awaiting the recommendation of the MSPB.

In the past, productivity has not been a recognized standard for determining good cause.[105] Both the SSA and the MSPB ALJs seem to be breaking new ground in this area. The Subcommittee does not have the substantive background to fully address this issue, since it involves consideration of the proper standard for good cause removal, an issue best addressed by the House and Senate Judiciary Committees with legislative jurisdiction in this area. However, the subcommittee does have great concern over the arbitrary selection by the SSA of the 20-

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[99] Id. at 6.
[100] Id.
[101] Data Provided by MSPB. See Hearing record, pp. 265–268. Thus far, the SSA has succeeded in 6 of 8 removals and there are currently 9 actions pending before the MSPB.
[102] Although the cases handled by ALJs in other agencies are quite different from those handled by the ALJs in the SSA, and it is difficult to compare the relative productivity of ALJs in other agencies to that of the SSA ALJ, in a conversation between the Chief ALJs at the NLRB and the Department of Labor (the agencies with the greatest productivity and number of ALJs employed after the SSA) and the Subcommittee staff, the judges indicated that the NLRB ALJ dispose of *1–25 cases per year*, and the Department of Labor ALJ disposes of *1–75 cases per year*.
[103] *Supra* fn. 101.
[104] See *SSA* v. *Robert W. Goodman*, MSPB, No. HQ75218210015, April 23, 1982; *SSA* v. *Irving Shore*, MSPB No. HQ75218210013, April 23, 1982; and *SSA* v. *Stanley M. Balaban*, MSPB No. HQ75218210014, April 20, 1982.
[105] *Supra* fn. 34.

case minimum. The SSA has not provided the Subcommittee with a satisfactory explanation as to why a disposition rate of 20 cases a month is an appropriate measure of minimally acceptable productivity.[106]

Finally, although the Subcommittee recognizes that there has been an increase in the support staff available to the ALJs, from an average of 3.7–1 in 1980,[107] to 4.7–1 in 1982,[108] the Subcommittee does not believe that this increase has been sufficient to offset the negative impact that the SSA's pressure to increase productivity is having on the ALJs and the disability claimants.

C. Reducing the ALJ Allowance Rate by Limiting the ALJ's Decisional Independence

1. INCORPORATION OF POMS INTO SSRS

The Program Operation Manual Systems (POMS), are defined as internal policy guidelines designed to amplify and explain Social Security Rulings (SSRs) and SSA regulations.[109] POMS are issued by the SSA and reflect the agency's position and policy. POMS are not subject to congressional or public review or comment; they are revised on a continuing basis and are circulated throughout the agency, but are specifically intended for the state disability examination offices.[110] SSRs are agency rulings issued by the SSA, but unlike POMS, SSRs are binding on all adjudicative personnel at both the State and Federal levels.[111]

Although POMS are supposed to explain SSRs and Federal regulations, POMS sometimes differ from SSRs and Federal regulations. Moreover, since the SSA began incorporating POMS into SSRs in 1981,[112] many SSRs now differ from their corresponding Federal regulations. Thus, the incorporation of POMS into SSRs affects the entire evaluation system.

There are two clear examples of these differences. First, with respect to the rules and regulations governing "Impairment Severity and Residual Functional Capacity" and second, with respect to the rules and regulations governing "Medical Equivalency."

a. "Impairment Severity and Residual Functional Capacity"

POMS DI 2107 outlines the sequential procedure to be used in determining whether an individual is disabled. In discussing how the severity of an individual's impairment should be evaluated, the POMS lists 20 examples of impairments that should be exclusively regarded as non-severe, irrespective of any other factor.

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[106] Id.
[107] Fiscal year 1980 Performance and Resources Profiles. Retained in Subcommittee files.
[108] Information contained in "ALJ and Hearing Office Statistics, FY 82." Retained in Subcommittee files. Upon checking with the OHA, for updated figures, the OHA indicated that the ALJ 4.7 to 1 ratio has stayed the same in the last year. Documentation retained in Subcommittee files.
[109] *Supra* fn. 10, p. 7.
[110] Id.
[111] Id.
[112] See the testimony of Louis B. Hays and Charles Bono before the House Ways and Means Committee, Subcommittee on Social Security, October 23 and 28, 1981, and a letter dated October 27, 1981, from Gray C. Adams, Deputy Director, Disability Evaluation Division to the Chief Counsel of the House Committee on Ways and Means, Social Security Subcommittee, hearing record pp. 6, 115 and 220, respectively. See also H.R. 3207 (Proposed Amendments to the Social Security Act.)

POMS DI 2107 corresponds directly to SR 82–55. Prior to the incorporation of the POMS, SSR 82–55 made no reference to impairments that were to be considered presumptively non-severe. However, the language of the POMS was incorporated verbatim into the SSRs' section on "Policy Statement" and the 20 presumptively non-severe impairments were included in the SSR.[113] Thus, a conflict was created between SSR 82–55 and 20 C.F.R. 416.921, which does not contain any listing of presumptively non-severe impairments.[114] The net effect, should ALJs subscribe to the ruling instead of the regulation, is to automatically preclude an evaluation of functional capacity for the 20 non-severe impairments, as presently allowed under the regulations.

b. "Medical Equivalency"

POMS DI 2104(B) outlines the procedure for determining whether a medical impairment meets the SSA's "Listing of Impairments" and therefore is eligible for benefits. It also outlines when and how medical judgment and evidence should be used and includes the following statements:

> (1) As in determining whether the listing is met, it is incorrect to consider whether the listing is equalled on the basis of an assessment of *overall* functional impairment.
>
> (2) The functional consequences of the impairments, irrespective of their nature or extent, *cannot* justify a determination of equivalence. [Emphasis supplied.] [115]

Again, the language of POMS 2104(B) was incorporated verbatim into the "Policy Statement" section of the corresponding SSR, SSR 83–19. This created a conflict between SSR 83–19 and 20 C.F.R. 416.920 (d) which governs the criteria for medical equivalency, but sets none of the limitations outlined in the POMS language.[116] The resulting problem was characterized by Annette Abrams, Director, Office of Intergovernmental Relations for the Michigan Department of Mental Health, this way:

> The concept of equivalency was to allow for medical judgment because in SSA's words, "impairment manifestations are so numerous and varied that it is difficult to include in the listings all the sets of medical findings which describe impairment severe enough to prevent gainful work." Having so stated [SSA] then removed the basis for judgment by emphasizing that decisions cannot be based on an *overall* assessment or on the functional consequences of the impairment. One may well ask if there is any room left for medical judgment within the POMS' [sic] cookbook approach. [Emphasis added.] [117]

The incorporation of POMS into SSRs greatly impacts upon the decisional independence of the ALJs who through actions of the

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[113] See Directory of the SSA Program Policy and Operations—Compilation of Social Security Disability Rulings, TN 1 1–83 Social Security Disability Rulings PP 00101.003.

[114] 20 C.F.R. 416.92(a) states: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

[115] *Supra* fn. 113.

[116] 20 C.F.R. 416.920(d) states:

"When your impairment meets or equals a listed impairment in Appendix 1. If you have an impairment which meets the duration requirement and is listed in Appendix 1 of Subpart P of Part 404 of this chapter or is equal to a listed impairment, we will find you disabled without considering your age, education, and work experience."

[117] Hearing record p. 320.

SSA are being forced to apply strict guidelines by which they were not previously bound. In reviewing the overall effect of this policy, the Subcommittee believes that by incorporating POMS into SSRs, the SSA is limiting the ALJs' scope of judgment for the determination of eligibility, and thus limiting the ability of the ALJs to make otherwise valid allowance decisions.

2. SSA'S POLICY OF NON-ACQUIESCENCE

Non-acquiescence is the term given to the SSA's policy of refusing to apply the rulings of certain court decisions beyond the individual cases in which the decisions were rendered. This practice is highly controversial and raises some very serious legal and constitutional questions. These questions focus primarily on the relationship between the Executive and Judicial branches of government, and the authority of the court to make and interpret laws which are binding on all litigants.

The SSA has articulated its particular non-acquiescence policy in two recent documents. First, section 1.161 of the Office of Hearings and Appeals Handbook states that:

> While the ALJs are bound by decisions of the United States Supreme Court, they should also make every reasonable effort to follow district or circuit [decisions] in matters where handling similar cases in that particular district or circuit. *However, where a district or circuit court's decision contains interpretations of the law, regulations or rulings which are inconsistent with the Secretary's interpretation, the ALJs should not consider such decision binding on future cases simply because the case was not appealed.* In certain cases, the SSA will not appeal a court decision it disagrees with, in view of special circumstances of the particular case (e.g., the limited effect of the decision). When SSA decides to acquiesce in a district court decision, which is inconsistent with our previous interpretation of the law, regulation or ruling, SSA will take appropriate action to implement changes by means of regulations, rulings, etc. ALJs will be promptly advised of such action. [Emphasis added.] [118]

Second, in a memorandum issued to all ALJs by Louis Hays on January 7, 1982, discussing "Adjudicatory Policy," Mr. Hays quoted the following statement made by Frank Dell 'Acqua, the Deputy Assistant General Counsel of the SSA:

> . . . . [T]he federal courts do not rule SSA's programs . . . ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court. Court decisions can result in the changing of policies, but it is not the role of ALJs to independently institute those changes. [Emphasis added.] [119]

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[118] Retained in Subcommittee files.
[119] Hearing record, p. 216.

The SSA has two ways of effectuating its non-acquiescence policy. The SSA may issue a formal written "ruling of non-acquiescence" in which it outlines the court decision to which it will not acquiesce and the SSA's policy regarding the issue(s) decided by the court [120] or the SSA may simply ignore a court decision and not mention it in any agency memorandum or policy statement.[121]

There have been eight formal SSA rulings of non-acquiescence in the past 16 years.[122] The number of unwritten non-acquiescence decisions is unknown.[123] Four of the rulings are particularly pertinent to the controversies surrounding the disability program.

a. *Finnegan* v. *Matthews*, 641 F.2d 1340 (9th Circuit 1981)[124]

This case involved the question of the continuing eligibility of persons "grandfathered" into the Supplemental Security Income (SSI) program, established by Congress in 1972.[125] Under this program the Federal Government assumed the responsibility previously assigned to the States to provide financial assistance to the needy aged, blind and disabled in accordance with the provisions of the Social Security Act.[126] Unlike the SSDI program which provides benefits to disabled workers and their dependents based on previous employment and wages, SSI benefits are not contingent upon proof of previous employment.

Pursuant to the provisions of the Act, an individual who had been on a State disability assistance program for at least six months prior to the effective date of the Federal program was transferred to the Federal benefit rolls. Persons who met this criteria were classified as "grandfatherees."

In the *Finnegan* case, pursuant to a disability review, the SSA terminated the benefits of the claimant, a grandfatheree, finding that he did not meet the requirements for entitlement at the time of his review. The district court affirmed the SSA's decision. However, the Ninth Circuit Court of Appeals reversed both the district court and the SSA, holding that:

> [SSI disability] benefits to a grandfatheree must not be terminated absent proof of material improvement in [the grandfatheree's] medical condition or the commission of a clear and specific error in the prior state determination.[127]

Outlining the SSA's position, the non-acquiescence ruling stated the following:

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[120] Copies of the SBA's rulings of non-acquiescence are retained in Subcommittee files.
[121] Written statement of Elena Ackel, one of the attorneys for the plaintiffs in *Lopez* v. *Heckler*, hearing record, p. 107. This information was also confirmed by Donald Gonya, Assistant General Counsel for the SSA in a conversation with Subcommittee staff. See fn. 123 *infra*.
[122] Hearing record p. 238.
[123] In a conversation between Donald A. Gonya, Assistant General Counsel, Social Security Division, Office of the General Counsel, Health and Human Services Department, and Subcommittee staff, on or about July 21, 1983, Mr. Gonya indicated that the SSA's policy of non-acquiescence was probably in effect between 1969 and 1979, but during this period, the SSA did not issue any formal written rulings of non-acquiescence decision. Therefore, it is impossible to determine how many non-acquiescence decisions there were. This, he indicated, was also true for the period prior to 1969.
[124] SSA Non-acquiescence Rulings—82–10C, SSRs for 1982, p. 303. Hearing record p. 430.
[125] 42 U.S.C.A. §§ 1351–1355, P.L. 92–603 (repealed 1972).
[126] 42 U.S.C.A. §§ 1381–1383.
[127] *Finnegan* at 1347.

> SSA believes that the court's standard for determining whether SSI disability benefits to a grandfatheree should terminate would be impossible to administer and that the correct standard for making such a determination is in 20 C.F.R. 416.994(e); i.e., that disability of a grandfatheree terminates when his or her disability is shown by current medical or other evidence does not meet the criteria of the appropriate state plan and does not meet the Federal criteria.[128]

b. *Patti* v. *Schweiker*, 669 F.2d 582 (9th Circuit 1982)[129]

This case involved the question of the continuing eligibility of a "non-grandfatheree" in the SSI program. Here again, reversing the decision of an ALJ, the SSA terminated the benefits of the plaintiff, Ms. Patti, a "non-grandfatheree," finding that she was no longer disabled. This determination was affirmed by the district court; however, on appeal to the Ninth Circuit Court of Appeals, the court reversed the SSA's termination decision and held that:

> The determination of disability in 1978 gave rise to a presumption as did the hearing in 1979, that the claimant was still disabled [and] that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed.[130]

This decision was in direct contradiction to the SSA's position which was outlined in the following statement:

> [R]egardless of whether medical improvement or other change is or is not shown under 20 C.F.R. 416.994(b)(1), a determination of cessation is appropriate for an SSI non-grandfatheree if the recipient is not disabled under the federal criteria, i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.[131]

Both the non-acquiescence rulings in *Finnegan* and *Patti* have been the source of much controversy. Although the SSA once employed the medical improvement standard,[132] it has not done so since 1976,[133] despite the fact that in recent years there have been 18 lawsuits challenging the SSA's refusal to do so.[134]

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[128] *Supra*, fn. 124.

[129] SSA Non-acquiescence Ruling—SSR 82-49c-SSR for 1982, p. 311. Hearing record, p. 438.

[130] Id. and *Patti* at 587.

[131] *Supra* fn. 129.

[132] See testimony of Peter J. McGough, Director, Office of Program Planning, GAO, before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1983, for further details. Retained in Subcommittee files.

[133] Id.

[134] Cases challenging the SSA's refusal to use the medical improvement standard include: *Finnegan* v. *Matthews*, 641 F.2d 1340 (1981), *Patti* v. *Schweiker*, 669 F.2d 582 (1982); *Morrison* v. *Heckler*, CA No. C82-888-v, U.S.D.C. for the Western District of Washington, January 1983; *Griffith* v. *Weinberger*, 509 F.2d 837 (9th Cir. 1975); *Day* v. *Weinberger*, 522 F.2d 1974 (9th Cir. 1975); *Rhodes* v. *Schweiker*, 660 F.2d 722 (9th Cir. 1981); *Almdale* v. *Heckler*, filed May 6, 1983, in the District of Alaska No. A83-242 CIV; *Lopez* v. *Schweiker*, CA No. 81-7189.7, U.S.D.C. Central District of California (1983); *Miranda* v. *Sec. of HEW*, 514 F.2d 996 (1st Cir. 1975); *Cassidy* v. *Harris*, 663 F.2d 745, 749 (7th Cir. 1981); *Weber* v. *Harris*, 640 (F.2d 176 (8th Cir. 1981); *Simpson* v. *Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982); *Hall* v. *Celebrezze* 314 F.2d 686 (6th Cir. 1963); *Rivas* v. *Weinberger*, 475 F.2d 255, 258 (5th Cir. 1973); *Trujillo, et al.* v. *Schweiker*, C.A. No. 82-K-1505 U.S.D.C. for the District of Colorado, decided August 16, 1983; *Paskel* v *Heckler*, CA No. 83-1201, U.S.D.C. for the Eastern District of Pennsylvania, filed March 30, 1983; *Chee* v. *Schweiker*, CA No. Civ.-82-693-PCJ VAC 1982 U.S.D.C., District of Arizona; *Kuzmin* v. *Schweiker*, No. 82-5705 (3rd Cir.), decided August 18, 1983.

Two other significant non-acquiescence ruling are *Levings* v. *Califano*, 604 F. 2d 591 (8th Circuit, 1979),[135] and *Campbell* v. *Secretary of Health and Human Services*, 665 F. 2d 48 (2nd Circuit 1981).[136] In *Levings*, the issue was whether a person who voluntarily resides and pays for the services in a publicly run nursing home is eligible for SSI benefits. According to the SSA, such persons were "inmates" of a public institution and therefore ineligible for benefits. This rule greatly affected many mentally disabled claimants who, feeling unable to care for themselves, chose to reside in publicly run homes and pay for the services provided there. Addressing this issue, the Eighth Circuit Court of Appeals made a distinction between persons involuntarily committed to a public institution at the taxpayers' expense, and persons residing in public institutions voluntarily and at their own expense, finding that the latter were not "inmates" and were therefore eligible to receive SSI benefits.

In *Campbell*, the issue turned on the opportunity of the claimant to do other work. In this case, the SSA terminated a claimant's benefits, finding that although the claimant was unable to do her previous job, she could do "light work." However, the SSA did not specify what type of work was included in its definition of "light work." The district court affirmed the SSA's decision, but on appeal to the Second Circuit Court of Appeals, the court held that in a determination of this nature, the SSA had to specify the type of work the claimant could do, and thereby give the claimant the opportunity to show that he or she is not able to perform such work.[137]

In an effort to defend its policy of non-acquiescence, the SSA has often asserted that its policy is no different than that of the Internal Revenue Service (IRS).[138] However, there is one critical distinction between non-acquiescence as practiced by the IRS and as practiced by the SSA. When the IRS declines to follow a decision of a federal court, unlike the SSA, it usually follows the decision at the administrative appeals level within the circuit or district in which the decision was rendered although it may not follow the decision in any other circuits or districts.[139] In addition, as noted by Paul Bender, Professor of Constitutional Law at the University of Pennsylvania School of Law.

> . . . It seems to me regardless of what happens with the IRS, this is a different situation. Here it has been said many times, if people lose benefits because of an administrative decision and the administration does not acquiesce, they are going to be without those benefits for a substantial period of time until they bring their own lawsuit or perhaps they will have to go up to the circuit level. That is a tremendous hardship on people." [140]

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[135] SSA Non-acquiescence ruling—SSR 80–11c. SSR for 1976–1980 p. 455. Retained in Subcommittee files.

[136] SSA Non-acquiescence ruling—SSR 82–33c—SSR for 1982 p. 152. Retained in Subcommittee files.

[137] In *Heckler* v. *Campbell* 461 U.S. _____, [no page number available at time of printing of report], the Supreme Court overturned the Court of Appeals ruling.

[138] See *Lopez* v. *Schweiker*, Defendant Brief in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction. Excerpts contained in hearing record p. 403. Copy of Brief retained in Subcommittee files.

[139] Based on information obtained in a conversation between the Deputy Chief Counsel for the IRS, Joel Gerber, and the Subcommittee staff in May 1983. See also footnote 11 of fn. 121 *supra*.

[140] Testimony of Professor Paul Bender, hearing record p. 140.

The SSA's policy most closely mirrors that of the National Labor Relations Board (NLRB). However, in two recent cases the courts spoke vociferously against the NLRB's policy.[141] Particularly, in *Allegheny General Hospital* v. *NLRB*. The Third Circuit Court of Appeals stated that:

> A decision by this court, not overruled by the U.S. Supreme Court, is a decision of the court of last resort in this Federal judicial circuit. *Thus, our judgments are binding on all inferior courts and litigants in the Third Judicial Circuit and also on administrative agencies when they deal with matters pertaining thereto.* [Citation omitted. Emphasis added.] [142]

Although the weight of judicial comment has been against the policy of non-acquiescence, on at least one occasion a court has spoken in favor of the policy.[143] Upholding a finding of the Railroad Retirement Board, the Seventh Circuit Court of Appeals stated:

> . . . we are unaware of any decisions requiring an agency to either appeal a circuit court holding or accept it as binding on the agency in all circuits where review could have been sought. Thus, the agency was bound to comply with the court's decisions only with regard to that litigant. [Citation omitted.] [144]

Nevertheless, the courts have taken specific exception to the SSA's policy. In a recent Arkansas case, the Eighth Circuit Court of Appeals held that:

> . . . the regulations of the HHS are not the supreme law of the land . . . It is emphatically the province of the judicial department to say what the law is . . . and the Secretary will ignore that principle at his peril. [Citation omitted.] [145]

Although the Supreme Court has not ruled on the SSA's policy of non-acquiescence, the Subcommittee has received testimony and legal briefs from individuals and organizations in various sectors of the legal community which argue that the SSA's policy violates three very basic tenets of American jurisprudence: (1) the doctrine of separation of powers; (2) the doctrine of *stare decisis*; and (3) the claimant's right to due process.

First, opponents of the policy argue that under the landmark case *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, (1803), and its progeny, it was unequivocally established that the judicial branch of government has the exclusive right and authority to interpret and enunciate the law, but through the use of the policy of non-acquiescence, the SSA attempts to reserve unto itself the right to interpret the law in direct contradiction to the mandate of the Constitution.

Second, opponents of the policy also argue that the policy ignores the doctrine of *stare decisis* which provides that the rule of a case cre-

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[141] See *Ithaca College* v. *NLRB*, 623 F.2d 224 (2d Cir. 1980) and *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979). Retained in Subcommittee files.
[142] *Allegheny General Hospital* at 970.
[143] See *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041 (7th Cir. 1982).
[144] Id. at 1046.
[145] *Hillhouse* v. *Harris* at 93.

ates binding precedence for all subsequent litigants; and inasmuch as administrative agencies are bound by the rulings of Federal Circuit Courts,[146] the SSA's non-acquiescence policy subverts the doctrine of *stare decisis*.

Finally, opponents of the policy argue that as provided by *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), SSDI benefits are "protected interests," and therefore under *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and *Bell* v. *Burson*, 402 U.S. 535 (1971), the SSDI adjudicative process must afford the claimant adequate protection of his or her due process rights. These rights include the right to a full, fair and meaningful hearing that allows for the consideration of *all* relevant issues. However, the SSA's non-acquiescence policy precludes the claimant from receiving a *full* hearing on all relevant issues because it ignores certain issues that the courts have previously deemed to be relevant.

The SSA contends that there is no legal doctrine that mandates that a Federal administrative agency is bound by the rulings of any Federal court below that of the Supreme Court, and that the Executive and Judicial branches of the Federal Government are co-equal, and neither can impose its will on the other. Thus, according to the SSA, the policy-non-acquiescence does not undermine the power of the Federal courts, but simply preserves the SSA's right to continue to litigate disputed issues.[147]

The most recent and significant judicial ruling on the SSA's non-acquiescence policy came with the decision in *Lopez* v. *Heckler*, CA No. 81–71897, U.S.D.C. Central District of California issued on June 16, 1983, by Judge William P. Gray. In this case, a class of disabled individuals and organizations representing disabled individuals residing in the Ninth Circuit, filed a suit against the SSA, seeking to enjoin the SSA from continuing to non-acquiesce to the earlier Ninth Circuit Court of Appeals decisions in *Patti* and *Finnegan* which required the use of the medical improvement standard in all SSA termination evaluations.

Ruling in the plaintiffs' favor, the court granted plaintiffs' request for a preliminary injunction and ordered the SSA to reinstate and review anyone who had been terminated without a showing of medical improvement in the Ninth Circuit in conformity with the decisions in *Patti* and *Finnegan*. Pursuant to this order the SSA issued a notice to 34,000 of the *Lopez* class members advising them that their claims would be re-evaluated, but also sought a stay in the Ninth Circuit Court of Appeals on the issues of reinstatement and payment of benefits. The Circuit Court denied the stay. However, the SSA appealed the Circuit Court's decision to the Supreme Court and was granted a temporary stay pending further consideration of the Court by Justice William Renquist.[148] On October 11, 1983, in a 5–4 decision the Court denied respondents' emergency application to vacate the stay entered by Justice Renquist.

Non-acquiescence harms disability recipients because it makes each individual fight the long and costly battle that was already won by a

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[146] See *Ithaca College* v. *NLRB* and *Allegheny General Hospital* v. *NLRB*, *supra* fn. 186; and *Hillhouse* v. *Harris*, *supra* fn. 21.

[147] *Supra* fn. 138.

[148] *Heckler* v. *Lopez* et al., No. A–145, Supreme Court of the United States, Application for Stay, September 9, 1983. Retained in Subcommittee files.

previous claimant. A claimant's ability to continue to receive benefits may very well depend on his or her perserverance and ability to fund litigation. For those unable to do just that, it means that they will be judged by a stricter standard than their stronger and more fortunate associates.

The ALJs are also detrimentally affected by the SSA's policy of non-acquiescence. The ALJs' predicament was described in *Hillhouse* v. *Harris*, when the court indicated that the ALJs are caught in the most unenviable position of "trying to serve two masters; the courts and the Secretary of Health and Human Services." [149] Moreover, this situation is demoralizing to the ALJs who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow precedent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandry for the ALJ.

D. Additional Pressures on Administrative Law Judges Aimed at Securing Their Conformity to SSA Policies

Another avenue affecting ALJ decisionmaking is by the SSA's use of the continuing education program.[150] This program is for ALJs who have been with the agency for more than two years and have not attended a recent training session.[151] The purpose of this program, according to the SSA, is to "familiarize the ALJs with a series of Social Security Rulings being published that set forth the agency's basic disability program policy."

Although on its face this training program seems quite reasonable, the SSA has sometimes used the training sessions in a punitive manner. Describing his experience with a training session, Administrative Law Judge Jerry Thomasson stated the following:

> . . . I got a call from Chief Judge Phillip Brown, through the regional chief judge, telling me they wanted me in Washington the following Tuesday morning for training. They gave me a room number in a building south of Washington, near Fort Belvoir. So I said, "Are any other judges going from the office?" And they said, "No. The idea is that you can teach the other judges how to write decisions."
>
> So, anyway, I went up there, and I went to the room at the appointed time, and it was a class of new Administrative Law Judges. So I sat at the back of that room for three days. [It was] a very humiliating experience, since [I] didn't feel [I] had done anything criminally wrong to be punished for, and [I'd] always worked hard and got the cases out. One of my claimants killed himself while I was there. He would have received his favorable decision prior to that but for the aforementioned harassment.[152]

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[149] *Supra* fn. 145.
[150] SSA responses to the Subcommittee's pre-hearing questions. Hearing record, p. 160.
[151] Id.
[152] Testimony of Administrative Law Judge Jerry Thomasson before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1983, for further details. (Page number not available at time of printing of this report.)

The SSA has also attempted to further reduce the ALJs' discretion by standardizing the ALJ hearing process through the implementation of "reconfiguration." In describing "reconfiguration," the SSA indicated the following:

> In its simplest terms, it changes the existing individual ALJ hearing unit method of case processing in favor of specialized units. These specialized units handle various aspects of case processing such as development, decision writing and decision typing and mailing in a centralized fashion. A major benefit of this system is that it is not solely dependent on an individual's ability (either the ALJ, or hearing assistant, or staff attorney, etc.) but rather capitalizes on group accomplishment.[153]

Implemented on an experimental basis in October 1980, reconfiguration was originally effectuated in only six hearing offices.[154] The reconfiguration managerial structure was expanded to thirty hearing offices in 1982.[155] Although, according to the SSA, this system allows for greater productivity,[156] under this system the ALJ no longer has individual staff assistance and may be deterred from developing a stable working relationship with any of the hearing office staff. Moreover, this approach has caused some staffing problems. Because the hearing office staff operates in groups, it is difficult to convey the same sense of individual responsibility. Most importantly, however, because under reconfiguration the ALJ no longer personally writes his or her decisions (except under very special circumstances, but merely provides the coordinator of the decision-writing pool with an outline of the decision which is subsequently assigned to a member of the pool, much of the individual ALJ input into the decision-writing process is lost. Thus, by standardizing the structure and relationships within the hearing offices, the SSA is restricting even further the individual discretion of the ALJs.

In addition to implementing changes within the hearing offices that undermine the ALJs' role in the SSDI adjudicative process, the SSA is also seeking to implement the face-to-face evidentiary hearing at reconsideration in a way which minimizes the role of the ALJ. The requirement for a face-to-face evidentiary hearing at reconsideration was enacted into law in 1983.[157] The SSA was directed to have such a hearing process in place by January 1, 1984.[158] As outlined in the SSA's proposed regulations, Federal employees (hearing officers) will be hired to conduct these evidentiary hearings.[159] According to the "Summary of the Meeting with DDS Advisory Committee on the Implementation of P.L. 97–455," [160] the hearing officers will be allowed 20 minutes to review the claimant's file before the hearing; each hearing is to take no more than 30–45 minutes; and, the hearing officer is

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[153] *Supra* fn. 95.
[154] Memorandum entitled "ALJ Policy Council Meeting," dated January 7, 1982, from Associate Commissioner, OHA to all ALJs, at p. 5. Retained in Subcommittee files.
[155] Id.
[156] Id.
[157] P.L. 97–455 (enacted on January 12, 1983).
[158] Id. at §§ 4,5.
[159] See *Federal Register*, Vol. 48, No. 158, Monday, August 15, 1983. Proposed Rules p. 36831.
[160] Retained in Subcommittee files.

permitted only 20 minutes immediately after the hearing to make a decision. The hearing itself is to be non-adversarial, although a claimant does have the right to have counsel present, and the hearing officer must prepare a summary of the facts and evidence presented, but no official record is made.[161]

Reporting on the pilot study on this process, the SSA made the following observations:

> During the project the DDSs reversed the initial cessation determination while developing the cases for hearing in 18 per cent of the cases. Hearing officers reversed the cessation decision in 24 percent of the cases that were forwarded to them by the DDS for a reconsideration hearing. The overall reconsideration level allowance rate during the pilot was 38 percent.[162]

There are three very important points that need to be made about this program. First, unlike ALJs, the hearing officers are totally subject to the instruction and supervision of the SSA and therefore must conform to agency policy and pronouncements regarding not only productivity, but case evaluation procedures and the use or non-use of certain criteria in case determinations. Second, these "face-to-face" hearings are very short, and the hearing officer is given very little time to review the claimant's file and make a determination. Thus, it is doubtful that these hearings will be of sufficient length to allow for a *full* and *fair* hearing that adequately protects the claimant's due process rights. Third, and most important, because this additional step in the appeals process is another burdensome requirement, it may (and in fact to some extent may be intended to) discourage claimants from pursuing their claims to the ALJ. The net result would be that fewer claimants will have the benefit of a full-fledged hearing before an *independent* hearing examiner who also has the responsibility and authority to develop the necessary evidence.

The major dangers of the "face-to-face evidentiary hearing" were summed up by Senator Cohen this way:

> What you're doing is, you're compressing this process. We're going to accelerate the number of cases disposed at the ALJ stage. We're going to compress the evidentiary hearings down to the reconsideration stage, and we're going to crank these people through at a rate of 20 minutes a hearing.
>
> I submit to you that what you're doing in terms of trying to achieve efficiency is, you're going to sacrifice quality of decisions, the very thing we're all saying we want.[163]

IV. EFFECTS OF PRESSURE

Unhappy about their plight, the ALJs have not remained silent but have chosen to fight back. There are two significant examples of the ALJ's efforts to stop the pressures being placed on them by the SSA: *Bono* v. *Heckler*, CA No. 77-0819-CV-W-4, U.S.D.C., Western

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[161] Id. at p.
[162] SSA post-hearing responses to the Subcommittee's additional request. Hearing record p. 262.
[163] Hearing record, p. 40.

District of Missouri, Western Division, and *Association of Administrative Law Judges, Inc.*, v. *Schweiker*, CA. No. 83–0124, U.S.D.C., District of Columbia.[164]

Bono v. *Heckler* was filed in 1977, by Administration Law Judge Charles Bono (now President of the Association of Administrative Law Judges, Inc. (AALJ, Inc.)). In that suit, Judge Bono and several other ALJs alleged that the SSA ALJs were being improperly pressured by the SSA to increase their disposition rate and decrease their allowance rate.[165] Prior to the trial, the parties negotiated a settlement agreement which *inter alia* prohibited the SSA from disseminating ALJ disposition and reversal rates, except as required by law, and issuing directives or memos setting disposition quotas or goals.[166]

In response to the SSA's alleged failure to abide by the terms of the *Bono* settlement,[167] AALJ, Inc. brought suit in *Association of Administrative Law Judges, Inc.* v. *Schweiker* in January, 1983, against the SSA and the MSPB alleging that the SSA was violating the APA by conducting illegal performance ratings of ALJs. The Association also claimed that SSA's actions violated the right of the ALJs to be removed only for "good cause." [168]

The SSA responded to the ALJs' arguments by asserting that the SSA is required by law to process claims promptly [169] and therefore has an obligation to encourage the ALJs to reach and maintain a certain level of production. Furthermore, contrary to the allegations of the ALJs, the SSA said it does not conduct performance ratings on ALJs, and pursuant to the Bellmon Amendment, the SSA has been mandated by Congress to review the decisions of the ALJs with high allowance rates.[170]

Pursuant to pre-trial negotiations, the parties agreed to an order pending the outcome of the litigation.[171] In that order, the SSA agreed to refrain from bringing any new ALJ removal cases before the MSPB based on productivity levels or high allowance rates, going forward with any peer counseling of ALJs, and adding any more judges to the Bellmon Review based on high allowance rates.[172]

In addition, both the SSA and the MSPB filed motions to dismiss. The court granted MSPB's motion and dismissed it from the case,[173] but denied the SSA's motion and ordered the parties to proceed to trial on September 27, 1983.[174]

Some ALJs have taken more personal action, such as opting for early retirement.[175] This option was chosen by one of the witnesses

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[164] The suit was resolved prior to litigation pursuant to a settlement agreement (the Bono settlement) which is currently still in effect.

[165] *Bono* v. *Heckler*, Plaintiff's Amended Complaint Filed April 22, 1978. Retained in Subcommittee files.

[166] The *Bono* settlement. Hearing record p. 448.

[167] *AALJ, Inc.* v. *Schweiker*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction. Retained in Subcommittee files.

[168] Id.

[169] *AALJ, Inc.* v. *Schweiker*, Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss by Defendants Schweiker, Svahn, Hays and Brown. Retained in Subcommittee files.

[170] Id.

[171] Retained in Subcommittee files.

[172] Retained in Subcommittee files.

[173] *AALJ, Inc.* v. *Schweiker*, Memorandum, Opinion and Order. Filed March 14, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[174] *AALJ, Inc.* v. *Schweiker*, Memorandum, Opinion and Order. Filed June 16, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[175] This option has been chosen by retired ALJ Jacob Friedes, Buffalo, New York, retired ALJ C.J. Occhipinti, Eugene, Oregon, and three other ALJs against whom disciplinary actions had been instituted. See data provided by MSPB. Hearing record, pp. 265–268.

at the hearing, retired Administrative Law Judge Jacob Friedes. Judge Friedes had been an ALJ with the SSA's Office of Hearings and Appeals in Buffalo, New York, for over seventeen years prior to his retirement in December, 1982. Judge Friedes was a very dedicated ALJ whose productivity level was as high as 34 case dispositions per month in 1979, and whose allowance rate prior to 1981 was 48 percent. Describing the events that led up to his decision to retire early Judge Friedes indicated that:

> The events leading up to my retirement centered around OHA pressure concerning production, scheduling of hearings, number of adjournments, reconfiguration, and later reversal rates. Inadequate help was a periodic problem with partial reconfiguration and was later intensified with full reconfiguration. Quotas were euphemistically called goals. Prior to any reconfiguration in the Buffalo office we had a unit or team approach. In the calendar year 1979, I was greatly assisted by Mr. Haydu, my staff attorney, and also my hearing assistant and secretary with decisional typing done by the typing pool, supervised by Mr. Allen. I also did pre-hearing screening of some cases. Under these circumstances, I was able to average 34 dispositions per month. . . . After Mr. Haydu resigned in March 1980 to take a supervisory position in Legal Aid, I had difficulty in securing an equally competent replacement for him. This difficulty was intensified with partial and full reconfiguration.
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> . . . I was dissatisfied with the case summaries, development, description of issues, pulling of exhibits, and writing in the pools. I therefore found that I had to perform these tasks more and more myself. I was also holding hearings myself to enable my secretary to do the additional development. I had continued working my usual 60-hour week, and I felt I could not work any harder. I finally reached the point where I felt I could not provide a full and complete hearing fair to claimants, government, and taxpayers under these circumstances.
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> . . . [Subsequently] I was informed by the Chief Judge of OHA in early December 1982 that I was scheduled for Bellmon Review because my reversal rate had exceeded 70 percent for a six-month period. I informed the Chief Judge that I was retiring effective December 31, 1982. He then doubted whether my decisions would be placed under Bellmon Review. My reversal rate for calendar year 1982 was 69.5 percent in comparison to my approximate 48 percent reversal rate for calendar year 1979. I suspect that the increase in my reversal rate in large part was due to the CDI program with its poor evidentiary input and my substantial documentary supplementation.[176]

The sentiments outlined by Judge Friedes were also echoed by Administrative Law Judge C. J. Occhipinti of the Eugene Hearing Office, who also chose to retire early. In a resignation [retirement] letter to Doris Coonrod, Regional Chief ALJ for Region X, Judge Occhipinti made the following statements:

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[176] Hearing record, pp. 81, 82, 86.

> This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken.
>
> . . . Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort—by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty.
>
> . . . I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayer, in this process. In all honesty, announcement 318, which presumes to recruit ALJs, should be abolished, or drastically revised.
>
> Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.[177]

The clearest demonstration of ALJ sentiment regarding their situation in the SSDI program was highlighted in a survey done in 1982 by Professor Donna Price Cofer, of Southwest Missouri State University, who surveyed the SSA ALJs for their opinions on their role within the SSA.[178] Almost 70 percent (approximately 500 ALJs) of the ALJs responded, three times that which is normally expected.[179] In responding to the question of whether "tacit agency pressure" was being placed on ALJs by the SSA to reduce their allowance rate, 77.1 percent of the judges agreed that the agency was pressuring them to reduce their allowance rates.[180] And an astounding 75.7 percent felt that the *quality* of their decisions had been damaged by the SSA's pressure to increase productivity.[181] These results clearly indicated that the majority of the SSA ALJs feel that they are being pressured by the SSA to decide cases in a certain way and at a faster rate, and that this pressure is having an adverse effect on the SSDI claimants.

The pressure placed on the ALJs has resulted in a decrease in the ALJ allowance rate and an increase in the ALJ productivity. Over the past year and a half, the ALJ allowance rate has decreased 23 per-

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[177] Hearing record, p. 348.

[178] At the time that this report was being written, Professor Cofer's report had not yet been copyrighted and was therefore unavailable for detailed and extensive use.

[179] According to Professor Cofer, this was a much larger return than the normally expected 30 per cent for a survey of this nature.

[180] Cofer, ALJ Study, *supra* fn. 85, Section 5, Question 3.

[181] Id. at Question 6.

POMS DI 2107 corresponds directly to SR 82–55. Prior to the incorporation of the POMS, SSR 82–55 made no reference to impairments that were to be considered presumptively non-severe. However, the language of the POMS was incorporated verbatim into the SSRs' section on "Policy Statement" and the 20 presumptively non-severe impairments were included in the SSR.[113] Thus, a conflict was created between SSR 82–55 and 20 C.F.R. 416.921, which does not contain any listing of presumptively non-severe impairments.[114] The net effect, should ALJs subscribe to the ruling instead of the regulation, is to automatically preclude an evaluation of functional capacity for the 20 non-severe impairments, as presently allowed under the regulations.

b. "Medical Equivalency"

POMS DI 2104(B) outlines the procedure for determining whether a medical impairment meets the SSA's "Listing of Impairments" and therefore is eligible for benefits. It also outlines when and how medical judgment and evidence should be used and includes the following statements:

> (1) As in determining whether the listing is met, it is incorrect to consider whether the listing is equalled on the basis of an assessment of *overall* functional impairment.
>
> (2) The functional consequences of the impairments, irrespective of their nature or extent, *cannot* justify a determination of equivalence. [Emphasis supplied.] [115]

Again, the language of POMS 2104(B) was incorporated verbatim into the "Policy Statement" section of the corresponding SSR, SSR 83–19. This created a conflict between SSR 83–19 and 20 C.F.R. 416.920 (d) which governs the criteria for medical equivalency, but sets none of the limitations outlined in the POMS language.[116] The resulting problem was characterized by Annette Abrams, Director, Office of Intergovernmental Relations for the Michigan Department of Mental Health, this way:

> The concept of equivalency was to allow for medical judgment because in SSA's words, "impairment manifestations are so numerous and varied that it is difficult to include in the listings all the sets of medical findings which describe impairment severe enough to prevent gainful work." Having so stated [SSA] then removed the basis for judgment by emphasizing that decisions cannot be based on an *overall* assessment or on the functional consequences of the impairment. One may well ask if there is any room left for medical judgment within the POMS' [sic] cookbook approach. [Emphasis added.] [117]

The incorporation of POMS into SSRs greatly impacts upon the decisional independence of the ALJs who through actions of the

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[113] See Directory of the SSA Program Policy and Operations—Compilation of Social Security Disability Rulings, TN 1 1–83 Social Security Disability Rulings PP 00101.003.

[114] 20 C.F.R. 416.92(a) states: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

[115] *Supra* fn. 113.

[116] 20 C.F.R. 416.920(d) states:

"When your impairment meets or equals a listed impairment in Appendix 1. If you have an impairment which meets the duration requirement and is listed in Appendix 1 of Subpart P of Part 404 of this chapter or is equal to a listed impairment, we will find you disabled without considering your age, education, and work experience."

[117] Hearing record p. 320.

SSA are being forced to apply strict guidelines by which they were not previously bound. In reviewing the overall effect of this policy, the Subcommittee believes that by incorporating POMS into SSRs, the SSA is limiting the ALJs' scope of judgment for the determination of eligibility, and thus limiting the ability of the ALJs to make otherwise valid allowance decisions.

2. SSA'S POLICY OF NON-ACQUIESCENCE

Non-acquiescence is the term given to the SSA's policy of refusing to apply the rulings of certain court decisions beyond the individual cases in which the decisions were rendered. This practice is highly controversial and raises some very serious legal and constitutional questions. These questions focus primarily on the relationship between the Executive and Judicial branches of government, and the authority of the court to make and interpret laws which are binding on all litigants.

The SSA has articulated its particular non-acquiescence policy in two recent documents. First, section 1.161 of the Office of Hearings and Appeals Handbook states that:

> While the ALJs are bound by decisions of the United States Supreme Court, they should also make every reasonable effort to follow district or circuit [decisions] in matters where handling similar cases in that particular district or circuit. *However, where a district or circuit court's decision contains interpretations of the law, regulations or rulings which are inconsistent with the Secretary's interpretation, the ALJs should not consider such decision binding on future cases simply because the case was not appealed.* In certain cases, the SSA will not appeal a court decision it disagrees with, in view of special circumstances of the particular case (e.g., the limited effect of the decision). When SSA decides to acquiesce in a district court decision, which is inconsistent with our previous interpretation of the law, regulation or ruling, SSA will take appropriate action to implement changes by means of regulations, rulings, etc. ALJs will be promptly advised of such action. [Emphasis added.] [118]

Second, in a memorandum issued to all ALJs by Louis Hays on January 7, 1982, discussing "Adjudicatory Policy," Mr. Hays quoted the following statement made by Frank Dell 'Acqua, the Deputy Assistant General Counsel of the SSA:

> . . . . [T]he federal courts do not rule SSA's programs . . . ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court. Court decisions can result in the changing of policies, but it is not the role of ALJs to independently institute those changes. [Emphasis added.] [119]

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[118] Retained in Subcommittee files.
[119] Hearing record, p. 216.

The SSA has two ways of effectuating its non-acquiescence policy. The SSA may issue a formal written "ruling of non-acquiescence" in which it outlines the court decision to which it will not acquiesce and the SSA's policy regarding the issue(s) decided by the court [120] or the SSA may simply ignore a court decision and not mention it in any agency memorandum or policy statement.[121]

There have been eight formal SSA rulings of non-acquiescence in the past 16 years.[122] The number of unwritten non-acquiescence decisions is unknown.[123] Four of the rulings are particularly pertinent to the controversies surrounding the disability program.

a. *Finnegan* v. *Matthews*, 641 F.2d 1340 (9th Circuit 1981)[124]

This case involved the question of the continuing eligibility of persons "grandfathered" into the Supplemental Security Income (SSI) program, established by Congress in 1972.[125] Under this program the Federal Government assumed the responsibility previously assigned to the States to provide financial assistance to the needy aged, blind and disabled in accordance with the provisions of the Social Security Act.[126] Unlike the SSDI program which provides benefits to disabled workers and their dependents based on previous employment and wages, SSI benefits are not contingent upon proof of previous employment.

Pursuant to the provisions of the Act, an individual who had been on a State disability assistance program for at least six months prior to the effective date of the Federal program was transferred to the Federal benefit rolls. Persons who met this criteria were classified as "grandfatherees."

In the *Finnegan* case, pursuant to a disability review, the SSA terminated the benefits of the claimant, a grandfatheree, finding that he did not meet the requirements for entitlement at the time of his review. The district court affirmed the SSA's decision. However, the Ninth Circuit Court of Appeals reversed both the district court and the SSA, holding that:

> [SSI disability] benefits to a grandfatheree must not be terminated absent proof of material improvement in [the grandfatheree's] medical condition or the commission of a clear and specific error in the prior state determination.[127]

Outlining the SSA's position, the non-acquiescence ruling stated the following:

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[120] Copies of the SBA's rulings of non-acquiescence are retained in Subcommittee files.

[121] Written statement of Elena Ackel, one of the attorneys for the plaintiffs in *Lopez* v. *Heckler*, hearing record, p. 107. This information was also confirmed by Donald Gonya, Assistant General Counsel for the SSA in a conversation with Subcommittee staff. See fn. 123 *infra*.

[122] Hearing record p. 238.

[123] In a conversation between Donald A. Gonya, Assistant General Counsel, Social Security Division, Office of the General Counsel, Health and Human Services Department, and Subcommittee staff, on or about July 21, 1983, Mr. Gonya indicated that the SSA's policy of non-acquiescence was probably in effect between 1969 and 1979, but during this period, the SSA did not issue any formal written rulings of non-acquiescence decision. Therefore, it is impossible to determine how many non-acquiescence decisions there were. This, he indicated, was also true for the period prior to 1969.

[124] SSA Non-acquiescence Rulings—82–10C, SSRs for 1982, p. 303. Hearing record p. 430.

[125] 42 U.S.C.A. §§ 1351–1355, P.L. 92–603 (repealed 1972).

[126] 42 U.S.C.A. §§ 1381–1383.

[127] *Finnegan* at 1347.

> SSA believes that the court's standard for determining whether SSI disability benefits to a grandfatheree should terminate would be impossible to administer and that the correct standard for making such a determination is in 20 C.F.R. 416.994(e); i.e., that disability of a grandfatheree terminates when his or her disability is shown by current medical or other evidence does not meet the criteria of the appropriate state plan and does not meet the Federal criteria.[128]

b. *Patti* v. *Schweiker*, 669 F.2d 582 (9th Circuit 1982)[129]

This case involved the question of the continuing eligibility of a "non-grandfatheree" in the SSI program. Here again, reversing the decision of an ALJ, the SSA terminated the benefits of the plaintiff, Ms. Patti, a "non-grandfatheree," finding that she was no longer disabled. This determination was affirmed by the district court; however, on appeal to the Ninth Circuit Court of Appeals, the court reversed the SSA's termination decision and held that:

> The determination of disability in 1978 gave rise to a presumption as did the hearing in 1979, that the claimant was still disabled [and] that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed.[130]

This decision was in direct contradiction to the SSA's position which was outlined in the following statement:

> [R]egardless of whether medical improvement or other change is or is not shown under 20 C.F.R. 416.994(b)(1), a determination of cessation is appropriate for an SSI non-grandfatheree if the recipient is not disabled under the federal criteria, i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.[131]

Both the non-acquiescence rulings in *Finnegan* and *Patti* have been the source of much controversy. Although the SSA once employed the medical improvement standard,[132] it has not done so since 1976,[133] despite the fact that in recent years there have been 18 lawsuits challenging the SSA's refusal to do so.[134]

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[128] *Supra*, fn. 124.

[129] SSA Non-acquiescence Ruling—SSR 82-49c-SSR for 1982, p. 311. Hearing record, p. 438.

[130] Id. and *Patti* at 587.

[131] *Supra* fn. 129.

[132] See testimony of Peter J. McGough, Director, Office of Program Planning, GAO, before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1983, for further details. Retained in Subcommittee files.

[133] Id.

[134] Cases challenging the SSA's refusal to use the medical improvement standard include: *Finnegan* v. *Matthews*, 641 F.2d 1340 (1981). *Patti* v. *Schweiker*, 669 F.2d 582 (1982); *Morrison* v. *Heckler*, CA No. C82-888-v, U.S.D.C. for the Western District of Washington, January 1983; *Griffith* v. *Weinberger*, 509 F.2d 837 (9th Cir. 1975); *Day* v. *Weinberger*, 522 F.2d 1974 (9th Cir. 1975); *Rhodes* v. *Schweiker*, 660 F.2d 722 (9th Cir. 1981); *Almdale* v. *Heckler*, filed May 6, 1983, in the District of Alaska No. A83-242 CIV; *Lopez* v. *Schweiker*, CA No. 81-7189.7, U.S.D.C. Central District of California (1983); *Miranda* v. *Sec. of HEW*, 514 F.2d 996 (1st Cir. 1975); *Cassidy* v. *Harris*, 663 F.2d 745, 749 (7th Cir. 1981); *Weber* v. *Harris*, 640 (F.2d 176 (8th Cir. 1981); *Simpson* v. *Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982); *Hall* v. *Celebrezze* 314 F.2d 686 (6th Cir. 1963); *Rivas* v. *Weinberger*, 475 F.2d 255, 258 (5th Cir. 1973); *Trujillo, et al.* v. *Schweiker*, C.A. No. 82-K-1505 U.S.D.C. for the District of Colorado, decided August 16, 1983; *Paskel* v *Heckler*, CA No. 83-1201, U.S.D.C. for the Eastern District of Pennsylvania, filed March 30, 1983; *Chee* v. *Schweiker*, CA No. Civ.-82-693-PCJ VAC 1982 U.S.D.C., District of Arizona; *Kuzmin* v. *Schweiker*, No. 82-5705 (3rd Cir.), decided August 18, 1983.

Two other significant non-acquiescence ruling are *Levings* v. *Califano*, 604 F. 2d 591 (8th Circuit, 1979),[135] and *Campbell* v. *Secretary of Health and Human Services*, 665 F. 2d 48 (2nd Circuit 1981).[136] In *Levings*, the issue was whether a person who voluntarily resides and pays for the services in a publicly run nursing home is eligible for SSI benefits. According to the SSA, such persons were "inmates" of a public institution and therefore ineligible for benefits. This rule greatly affected many mentally disabled claimants who, feeling unable to care for themselves, chose to reside in publicly run homes and pay for the services provided there. Addressing this issue, the Eighth Circuit Court of Appeals made a distinction between persons involuntarily committed to a public institution at the taxpayers' expense, and persons residing in public institutions voluntarily and at their own expense, finding that the latter were not "inmates" and were therefore eligible to receive SSI benefits.

In *Campbell*, the issue turned on the opportunity of the claimant to do other work. In this case, the SSA terminated a claimant's benefits, finding that although the claimant was unable to do her previous job, she could do "light work." However, the SSA did not specify what type of work was included in its definition of "light work." The district court affirmed the SSA's decision, but on appeal to the Second Circuit Court of Appeals, the court held that in a determination of this nature, the SSA had to specify the type of work the claimant could do, and thereby give the claimant the opportunity to show that he or she is not able to perform such work.[137]

In an effort to defend its policy of non-acquiescence, the SSA has often asserted that its policy is no different than that of the Internal Revenue Service (IRS).[138] However, there is one critical distinction between non-acquiescence as practiced by the IRS and as practiced by the SSA. When the IRS declines to follow a decision of a federal court, unlike the SSA, it usually follows the decision at the administrative appeals level within the circuit or district in which the decision was rendered although it may not follow the decision in any other circuits or districts.[139] In addition, as noted by Paul Bender, Professor of Constitutional Law at the University of Pennsylvania School of Law.

> . . . It seems to me regardless of what happens with the IRS, this is a different situation. Here it has been said many times, if people lose benefits because of an administrative decision and the administration does not acquiesce, they are going to be without those benefits for a substantial period of time until they bring their own lawsuit or perhaps they will have to go up to the circuit level. That is a tremendous hardship on people." [140]

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[135] SSA Non-acquiescence ruling—SSR 80–11c. SSR for 1976–1980 p. 455. Retained in Subcommittee files.

[136] SSA Non-acquiescence ruling—SSR 82–33c—SSR for 1982 p. 152. Retained in Subcommittee files.

[137] In *Heckler* v. *Campbell* 461 U.S. _____, [no page number available at time of printing of report], the Supreme Court overturned the Court of Appeals ruling.

[138] See *Lopez* v. *Schweiker*, Defendant Brief in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction. Excerpts contained in hearing record p. 403. Copy of Brief retained in Subcommittee files.

[139] Based on information obtained in a conversation between the Deputy Chief Counsel for the IRS, Joel Gerber, and the Subcommittee staff in May 1983. See also footnote 11 of fn. 121 *supra*.

[140] Testimony of Professor Paul Bender, hearing record p. 140.

The SSA's policy most closely mirrors that of the National Labor Relations Board (NLRB). However, in two recent cases the courts spoke vociferously against the NLRB's policy.[141] Particularly, in *Allegheny General Hospital* v. *NLRB*. The Third Circuit Court of Appeals stated that:

> A decision by this court, not overruled by the U.S. Supreme Court, is a decision of the court of last resort in this Federal judicial circuit. *Thus, our judgments are binding on all inferior courts and litigants in the Third Judicial Circuit and also on administrative agencies when they deal with matters pertaining thereto.* [Citation omitted. Emphasis added.] [142]

Although the weight of judicial comment has been against the policy of non-acquiescence, on at least one occasion a court has spoken in favor of the policy.[143] Upholding a finding of the Railroad Retirement Board, the Seventh Circuit Court of Appeals stated:

> . . . we are unaware of any decisions requiring an agency to either appeal a circuit court holding or accept it as binding on the agency in all circuits where review could have been sought. Thus, the agency was bound to comply with the court's decisions only with regard to that litigant. [Citation omitted.] [144]

Nevertheless, the courts have taken specific exception to the SSA's policy. In a recent Arkansas case, the Eighth Circuit Court of Appeals held that:

> . . . the regulations of the HHS are not the supreme law of the land . . . It is emphatically the province of the judicial department to say what the law is . . . and the Secretary will ignore that principle at his peril. [Citation omitted.] [145]

Although the Supreme Court has not ruled on the SSA's policy of non-acquiescence, the Subcommittee has received testimony and legal briefs from individuals and organizations in various sectors of the legal community which argue that the SSA's policy violates three very basic tenets of American jurisprudence: (1) the doctrine of separation of powers; (2) the doctrine of *stare decisis*; and (3) the claimant's right to due process.

First, opponents of the policy argue that under the landmark case *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, (1803), and its progeny, it was unequivocally established that the judicial branch of government has the exclusive right and authority to interpret and enunciate the law, but through the use of the policy of non-acquiescence, the SSA attempts to reserve unto itself the right to interpret the law in direct contradiction to the mandate of the Constitution.

Second, opponents of the policy also argue that the policy ignores the doctrine of *stare decisis* which provides that the rule of a case cre-

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[141] See *Ithaca College* v. *NLRB*, 623 F.2d 224 (2d Cir. 1980) and *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979). Retained in Subcommittee files.
[142] *Allegheny General Hospital* at 970.
[143] See *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041 (7th Cir. 1982).
[144] Id. at 1046.
[145] *Hillhouse* v. *Harris* at 93.

ates binding precedence for all subsequent litigants; and inasmuch as administrative agencies are bound by the rulings of Federal Circuit Courts,[146] the SSA's non-acquiescence policy subverts the doctrine of *stare decisis*.

Finally, opponents of the policy argue that as provided by *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), SSDI benefits are "protected interests," and therefore under *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and *Bell* v. *Burson*, 402 U.S. 535 (1971), the SSDI adjudicative process must afford the claimant adequate protection of his or her due process rights. These rights include the right to a full, fair and meaningful hearing that allows for the consideration of *all* relevant issues. However, the SSA's non-acquiescence policy precludes the claimant from receiving a *full* hearing on all relevant issues because it ignores certain issues that the courts have previously deemed to be relevant.

The SSA contends that there is no legal doctrine that mandates that a Federal administrative agency is bound by the rulings of any Federal court below that of the Supreme Court, and that the Executive and Judicial branches of the Federal Government are co-equal, and neither can impose its will on the other. Thus, according to the SSA, the policy-non-acquiescence does not undermine the power of the Federal courts, but simply preserves the SSA's right to continue to litigate disputed issues.[147]

The most recent and significant judicial ruling on the SSA's non-acquiescence policy came with the decision in *Lopez* v. *Heckler*, CA No. 81–71897, U.S.D.C. Central District of California issued on June 16, 1983, by Judge William P. Gray. In this case, a class of disabled individuals and organizations representing disabled individuals residing in the Ninth Circuit, filed a suit against the SSA, seeking to enjoin the SSA from continuing to non-acquiesce to the earlier Ninth Circuit Court of Appeals decisions in *Patti* and *Finnegan* which required the use of the medical improvement standard in all SSA termination evaluations.

Ruling in the plaintiffs' favor, the court granted plaintiffs' request for a preliminary injunction and ordered the SSA to reinstate and review anyone who had been terminated without a showing of medical improvement in the Ninth Circuit in conformity with the decisions in *Patti* and *Finnegan*. Pursuant to this order the SSA issued a notice to 34,000 of the *Lopez* class members advising them that their claims would be re-evaluated, but also sought a stay in the Ninth Circuit Court of Appeals on the issues of reinstatement and payment of benefits. The Circuit Court denied the stay. However, the SSA appealed the Circuit Court's decision to the Supreme Court and was granted a temporary stay pending further consideration of the Court by Justice William Renquist.[148] On October 11, 1983, in a 5–4 decision the Court denied respondents' emergency application to vacate the stay entered by Justice Renquist.

Non-acquiescence harms disability recipients because it makes each individual fight the long and costly battle that was already won by a

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[146] See *Ithaca College* v. *NLRB* and *Allegheny General Hospital* v. *NLRB*, *supra* fn. 186; and *Hillhouse* v. *Harris*, *supra* fn. 21.

[147] *Supra* fn. 138.

[148] *Heckler* v. *Lopez* et al., No. A–145, Supreme Court of the United States, Application for Stay, September 9, 1983. Retained in Subcommittee files.

previous claimant. A claimant's ability to continue to receive benefits may very well depend on his or her perserverance and ability to fund litigation. For those unable to do just that, it means that they will be judged by a stricter standard than their stronger and more fortunate associates.

The ALJs are also detrimentally affected by the SSA's policy of non-acquiescence. The ALJs' predicament was described in *Hillhouse* v. *Harris*, when the court indicated that the ALJs are caught in the most unenviable position of "trying to serve two masters; the courts and the Secretary of Health and Human Services." [149] Moreover, this situation is demoralizing to the ALJs who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow precedent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandry for the ALJ.

D. Additional Pressures on Administrative Law Judges Aimed at Securing Their Conformity to SSA Policies

Another avenue affecting ALJ decisionmaking is by the SSA's use of the continuing education program.[150] This program is for ALJs who have been with the agency for more than two years and have not attended a recent training session.[151] The purpose of this program, according to the SSA, is to "familiarize the ALJs with a series of Social Security Rulings being published that set forth the agency's basic disability program policy."

Although on its face this training program seems quite reasonable, the SSA has sometimes used the training sessions in a punitive manner. Describing his experience with a training session, Administrative Law Judge Jerry Thomasson stated the following:

> . . . I got a call from Chief Judge Phillip Brown, through the regional chief judge, telling me they wanted me in Washington the following Tuesday morning for training. They gave me a room number in a building south of Washington, near Fort Belvoir. So I said, "Are any other judges going from the office?" And they said, "No. The idea is that you can teach the other judges how to write decisions."
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> So, anyway, I went up there, and I went to the room at the appointed time, and it was a class of new Administrative Law Judges. So I sat at the back of that room for three days. [It was] a very humiliating experience, since [I] didn't feel [I] had done anything criminally wrong to be punished for, and [I'd] always worked hard and got the cases out. One of my claimants killed himself while I was there. He would have received his favorable decision prior to that but for the aforementioned harassment.[152]

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[149] *Supra* fn. 145.
[150] SSA responses to the Subcommittee's pre-hearing questions. Hearing record, p. 160.
[151] Id.
[152] Testimony of Administrative Law Judge Jerry Thomasson before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1983, for further details. (Page number not available at time of printing of this report.)

The SSA has also attempted to further reduce the ALJs' discretion by standardizing the ALJ hearing process through the implementation of "reconfiguration." In describing "reconfiguration," the SSA indicated the following:

> In its simplest terms, it changes the existing individual ALJ hearing unit method of case processing in favor of specialized units. These specialized units handle various aspects of case processing such as development, decision writing and decision typing and mailing in a centralized fashion. A major benefit of this system is that it is not solely dependent on an individual's ability (either the ALJ, or hearing assistant, or staff attorney, etc.) but rather capitalizes on group accomplishment.[153]

Implemented on an experimental basis in October 1980, reconfiguration was originally effectuated in only six hearing offices.[154] The reconfiguration managerial structure was expanded to thirty hearing offices in 1982.[155] Although, according to the SSA, this system allows for greater productivity,[156] under this system the ALJ no longer has individual staff assistance and may be deterred from developing a stable working relationship with any of the hearing office staff. Moreover, this approach has caused some staffing problems. Because the hearing office staff operates in groups, it is difficult to convey the same sense of individual responsibility. Most importantly, however, because under reconfiguration the ALJ no longer personally writes his or her decisions (except under very special circumstances, but merely provides the coordinator of the decision-writing pool with an outline of the decision which is subsequently assigned to a member of the pool, much of the individual ALJ input into the decision-writing process is lost. Thus, by standardizing the structure and relationships within the hearing offices, the SSA is restricting even further the individual discretion of the ALJs.

In addition to implementing changes within the hearing offices that undermine the ALJs' role in the SSDI adjudicative process, the SSA is also seeking to implement the face-to-face evidentiary hearing at reconsideration in a way which minimizes the role of the ALJ. The requirement for a face-to-face evidentiary hearing at reconsideration was enacted into law in 1983.[157] The SSA was directed to have such a hearing process in place by January 1, 1984.[158] As outlined in the SSA's proposed regulations, Federal employees (hearing officers) will be hired to conduct these evidentiary hearings.[159] According to the "Summary of the Meeting with DDS Advisory Committee on the Implementation of P.L. 97–455," [160] the hearing officers will be allowed 20 minutes to review the claimant's file before the hearing; each hearing is to take no more than 30–45 minutes; and, the hearing officer is

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[153] *Supra* fn. 95.
[154] Memorandum entitled "ALJ Policy Council Meeting," dated January 7, 1982, from Associate Commissioner, OHA to all ALJs, at p. 5. Retained in Subcommittee files.
[155] Id.
[156] Id.
[157] P.L. 97–455 (enacted on January 12, 1983).
[158] Id. at §§ 4,5.
[159] See *Federal Register*, Vol. 48, No. 158, Monday, August 15, 1983. Proposed Rules p. 36831.
[160] Retained in Subcommittee files.

permitted only 20 minutes immediately after the hearing to make a decision. The hearing itself is to be non-adversarial, although a claimant does have the right to have counsel present, and the hearing officer must prepare a summary of the facts and evidence presented, but no official record is made.[161]

Reporting on the pilot study on this process, the SSA made the following observations:

> During the project the DDSs reversed the initial cessation determination while developing the cases for hearing in 18 per cent of the cases. Hearing officers reversed the cessation decision in 24 percent of the cases that were forwarded to them by the DDS for a reconsideration hearing. The overall reconsideration level allowance rate during the pilot was 38 percent.[162]

There are three very important points that need to be made about this program. First, unlike ALJs, the hearing officers are totally subject to the instruction and supervision of the SSA and therefore must conform to agency policy and pronouncements regarding not only productivity, but case evaluation procedures and the use or non-use of certain criteria in case determinations. Second, these "face-to-face" hearings are very short, and the hearing officer is given very little time to review the claimant's file and make a determination. Thus, it is doubtful that these hearings will be of sufficient length to allow for a *full* and *fair* hearing that adequately protects the claimant's due process rights. Third, and most important, because this additional step in the appeals process is another burdensome requirement, it may (and in fact to some extent may be intended to) discourage claimants from pursuing their claims to the ALJ. The net result would be that fewer claimants will have the benefit of a full-fledged hearing before an *independent* hearing examiner who also has the responsibility and authority to develop the necessary evidence.

The major dangers of the "face-to-face evidentiary hearing" were summed up by Senator Cohen this way:

> What you're doing is, you're compressing this process. We're going to accelerate the number of cases disposed at the ALJ stage. We're going to compress the evidentiary hearings down to the reconsideration stage, and we're going to crank these people through at a rate of 20 minutes a hearing.
>
> I submit to you that what you're doing in terms of trying to achieve efficiency is, you're going to sacrifice quality of decisions, the very thing we're all saying we want.[163]

IV. EFFECTS OF PRESSURE

Unhappy about their plight, the ALJs have not remained silent but have chosen to fight back. There are two significant examples of the ALJ's efforts to stop the pressures being placed on them by the SSA: *Bono* v. *Heckler*, CA No. 77–0819–CV–W–4, U.S.D.C., Western

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[161] Id. at p.
[162] SSA post-hearing responses to the Subcommittee's additional request. Hearing record p. 262.
[163] Hearing record, p. 40.

District of Missouri, Western Division, and *Association of Administrative Law Judges, Inc.*, v. *Schweiker*, CA. No. 83–0124, U.S.D.C., District of Columbia.[164]

Bono v. *Heckler* was filed in 1977, by Administration Law Judge Charles Bono (now President of the Association of Administrative Law Judges, Inc. (AALJ, Inc.)). In that suit, Judge Bono and several other ALJs alleged that the SSA ALJs were being improperly pressured by the SSA to increase their disposition rate and decrease their allowance rate.[165] Prior to the trial, the parties negotiated a settlement agreement which *inter alia* prohibited the SSA from disseminating ALJ disposition and reversal rates, except as required by law, and issuing directives or memos setting disposition quotas or goals.[166]

In response to the SSA's alleged failure to abide by the terms of the *Bono* settlement,[167] AALJ, Inc. brought suit in *Association of Administrative Law Judges, Inc.* v. *Schweiker* in January, 1983, against the SSA and the MSPB alleging that the SSA was violating the APA by conducting illegal performance ratings of ALJs. The Association also claimed that SSA's actions violated the right of the ALJs to be removed only for "good cause." [168]

The SSA responded to the ALJs' arguments by asserting that the SSA is required by law to process claims promptly [169] and therefore has an obligation to encourage the ALJs to reach and maintain a certain level of production. Furthermore, contrary to the allegations of the ALJs, the SSA said it does not conduct performance ratings on ALJs, and pursuant to the Bellmon Amendment, the SSA has been mandated by Congress to review the decisions of the ALJs with high allowance rates.[170]

Pursuant to pre-trial negotiations, the parties agreed to an order pending the outcome of the litigation.[171] In that order, the SSA agreed to refrain from bringing any new ALJ removal cases before the MSPB based on productivity levels or high allowance rates, going forward with any peer counseling of ALJs, and adding any more judges to the Bellmon Review based on high allowance rates.[172]

In addition, both the SSA and the MSPB filed motions to dismiss. The court granted MSPB's motion and dismissed it from the case,[173] but denied the SSA's motion and ordered the parties to proceed to trial on September 27, 1983.[174]

Some ALJs have taken more personal action, such as opting for early retirement.[175] This option was chosen by one of the witnesses

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[164] The suit was resolved prior to litigation pursuant to a settlement agreement (the Bono settlement) which is currently still in effect.

[165] *Bono* v. *Heckler*, Plaintiff's Amended Complaint Filed April 22, 1978. Retained in Subcommittee files.

[166] The *Bono* settlement. Hearing record p. 448.

[167] *AALJ, Inc.* v. *Schweiker*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction. Retained in Subcommittee files.

[168] Id.

[169] *AALJ, Inc.* v. *Schweiker*, Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss by Defendants Schweiker, Svahn, Hays and Brown. Retained in Subcommittee files.

[170] Id.

[171] Retained in Subcommittee files.

[172] Retained in Subcommittee files.

[173] *AALJ, Inc.* v. *Schweiker*, Memorandum, Opinion and Order. Filed March 14, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[174] *AALJ, Inc.* v. *Schweiker*, Memorandum, Opinion and Order. Filed June 16, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[175] This option has been chosen by retired ALJ Jacob Friedes, Buffalo, New York, retired ALJ C.J. Occhipinti, Eugene, Oregon, and three other ALJs against whom disciplinary actions had been instituted. See data provided by MSPB. Hearing record, pp. 265–268.

at the hearing, retired Administrative Law Judge Jacob Friedes. Judge Friedes had been an ALJ with the SSA's Office of Hearings and Appeals in Buffalo, New York, for over seventeen years prior to his retirement in December, 1982. Judge Friedes was a very dedicated ALJ whose productivity level was as high as 34 case dispositions per month in 1979, and whose allowance rate prior to 1981 was 48 percent. Describing the events that led up to his decision to retire early Judge Friedes indicated that:

> The events leading up to my retirement centered around OHA pressure concerning production, scheduling of hearings, number of adjournments, reconfiguration, and later reversal rates. Inadequate help was a periodic problem with partial reconfiguration and was later intensified with full reconfiguration. Quotas were euphemistically called goals. Prior to any reconfiguration in the Buffalo office we had a unit or team approach. In the calendar year 1979, I was greatly assisted by Mr. Haydu, my staff attorney, and also my hearing assistant and secretary with decisional typing done by the typing pool, supervised by Mr. Allen. I also did pre-hearing screening of some cases. Under these circumstances, I was able to average 34 dispositions per month. . . . After Mr. Haydu resigned in March 1980 to take a supervisory position in Legal Aid, I had difficulty in securing an equally competent replacement for him. This difficulty was intensified with partial and full reconfiguration.
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> . . . I was dissatisfied with the case summaries, development, description of issues, pulling of exhibits, and writing in the pools. I therefore found that I had to perform these tasks more and more myself. I was also holding hearings myself to enable my secretary to do the additional development. I had continued working my usual 60-hour week, and I felt I could not work any harder. I finally reached the point where I felt I could not provide a full and complete hearing fair to claimants, government, and taxpayers under these circumstances.
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> . . . [Subsequently] I was informed by the Chief Judge of OHA in early December 1982 that I was scheduled for Bellmon Review because my reversal rate had exceeded 70 percent for a six-month period. I informed the Chief Judge that I was retiring effective December 31, 1982. He then doubted whether my decisions would be placed under Bellmon Review. My reversal rate for calendar year 1982 was 69.5 percent in comparison to my approximate 48 percent reversal rate for calendar year 1979. I suspect that the increase in my reversal rate in large part was due to the CDI program with its poor evidentiary input and my substantial documentary supplementation.[176]

The sentiments outlined by Judge Friedes were also echoed by Administrative Law Judge C. J. Occhipinti of the Eugene Hearing Office, who also chose to retire early. In a resignation [retirement] letter to Doris Coonrod, Regional Chief ALJ for Region X, Judge Occhipinti made the following statements:

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[176] Hearing record, pp. 81, 82, 86.

> This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken.
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> . . . Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort—by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty.
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> . . . I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayer, in this process. In all honesty, announcement 318, which presumes to recruit ALJs, should be abolished, or drastically revised.
>
> Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.[177]

The clearest demonstration of ALJ sentiment regarding their situation in the SSDI program was highlighted in a survey done in 1982 by Professor Donna Price Cofer, of Southwest Missouri State University, who surveyed the SSA ALJs for their opinions on their role within the SSA.[178] Almost 70 percent (approximately 500 ALJs) of the ALJs responded, three times that which is normally expected.[179] In responding to the question of whether "tacit agency pressure" was being placed on ALJs by the SSA to reduce their allowance rate, 77.1 percent of the judges agreed that the agency was pressuring them to reduce their allowance rates.[180] And an astounding 75.7 percent felt that the *quality* of their decisions had been damaged by the SSA's pressure to increase productivity.[181] These results clearly indicated that the majority of the SSA ALJs feel that they are being pressured by the SSA to decide cases in a certain way and at a faster rate, and that this pressure is having an adverse effect on the SSDI claimants.

The pressure placed on the ALJs has resulted in a decrease in the ALJ allowance rate and an increase in the ALJ productivity. Over the past year and a half, the ALJ allowance rate has decreased 23 per-

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[177] Hearing record, p. 348.

[178] At the time that this report was being written, Professor Cofer's report had not yet been copyrighted and was therefore unavailable for detailed and extensive use.

[179] According to Professor Cofer, this was a much larger return than the normally expected 30 per cent for a survey of this nature.

[180] Cofer, ALJ Study, *supra* fn. 85, Section 5, Question 3.

[181] Id. at Question 6.

cent,[182] and the ALJ production rate has increased 25 percent.[183] Thus, it appears that the SSA is achieving its objectives. However, the achievement has been at an immeasureable cost to individual lives and to the integrity of the SSDI program.

V. FINDINGS

The principal finding of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program by:

Focusing its review and study efforts principally on the ALJ allowance rate and ALJs with high allowance rates;

Increasing the rate at which ALJs are expected to decide cases (the disposition rate), thereby reducing the quantity and quality of time that an ALJ has to devote to each case and lessening the opportunity for an ALJ to develop additional evidence which may support an allowance decision;

Reinforcing ALJ conduct which reduces allowance rates and increases disposition rates through memos of praise to and within the field offices for such activity; and

Limiting the decisional independence of the ALJs through the use of Social Security Rulings and a policy of selected non-acquiescence in federal court decisions.

Further, the Subcommittee finds that:

The SSA views the ALJ allowance rate as the source of the problems in the disability adjudicative process, even though its own initial review in the Bellmon Study has shown otherwise. The SSA has therefore unjustifiably and inequitably focused its efforts on the ALJ allowance rate and ALJs with high allowance rates in such a way as to result in less impartial and fair hearings for some disability claimants.

High ALJ allowance rates are only symptomatic of serious inconsistencies and problems in the disability program. The initial review conducted by the SSA as part of the Bellmon Study concluded that the high rate of allowance decisions by ALJs does not necessarily mean that ALJs are acting in error. ALJs are provided with a better opportunity to fairly determine a claimant's eligibility than the State DDS examiners and are entitled to apply different and more flexible standards in the evaluation process, while DDS examiners must work with limited evidence within the confines of strict agency policy and without the benefit of a personal appearance by the claimant.

The SSA has established explicit production goals for its ALJs and an implied production quota. SSA documents show a production goal of 45 case dispositions per month per ALJ by September 1983. And in view of the SSA's actions and comments, it is

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[182] Based on information provided by the SSA Office of Hearings and Appeals, 1983 computer data, June 1983. Documents retained in Subcommittee files.

[183] Based on information provided by the SSA Office of Hearings and Appeals. See also ALJ and Hearing Office Statistics, FY81 and computer data available from OHA documents.

the Subcommittee's conclusion that an implied minimum quota of 20 case dispositions per month per ALJ is in effect. If an ALJ falls below that level, he or she will be subject to counseling, and if there is no improvement after counseling, it is likely that the SSA will file a complaint for punitive action with the Merit Systems Protection Board.

The proposed format for establishing face-to-face evidentiary hearings at reconsideration, if implemented, may undermine the role of the ALJ in the appeals process by reducing the number of claimants who will be willing to pursue an appeal to the ALJ level by creating yet another obstacle for the adjudication weary disabled claimant to overcome, and thereby substituting a review by an SSA employee who will be subject to the direct control and supervision of the SSA, for review by an independent ALJ.

VI. RECOMMENDATIONS

Based on the above findings, the Subcommittee recommends the following:

All Bellmon Review activity should be discontinued immediately, and the Bellmon Amendment should be repealed. While the amendment was a worthwhile proposal at the time it was passed, the report issued by the SSA in January, 1982, referred to as "The Bellmon Report" fulfilled the mandates of the amendment. It has given Congress and the SSA valuable information about the nature of the problems in the adjudicative process in the disability program and the reasons for the differences between the decisions of the state disability examiners and the ALJs. The appropriate response now is to legislate reform in the adjudicative process. Continued review of ALJs will serve only as a tool of harassment and undesirable decisionmaking pressure.

Any present or future reference, either oral or written, by the SSA as to the desirability of reducing the ALJ allowance rates should be prohibited. Furthermore, while it may be managerially helpful to maintain statistics on the allowance and disposition rates of individual ALJs, the SSA should stop the practice of ranking ALJs on this basis in any internal or external documents.

The SSA should immediately discontinue any further incorporation of POMS into SSRs. All standards for disability evaluation which are to be binding on the ALJs should be made subject to public notice and comment.

The SSA should immediately cease its policy of non-acquiescence in decisions issued by Circuit Courts of Appeal. Both of these recommendations are addressed in legislative language in S. 476, a bill to reform the continuing disability review process, which was introduced by Senators Levin and Cohen of this Subcommittee earlier this year.

The Judiciary Committees of both the House and the Senate should review the propriety and legality of minimal productivity quotas imposed by employer agencies on employee ALJs.

VII. CONCLUSION

The APA mandates that the ALJ be an independent, impartial adjudicator in the administrative process and in so doing separates the adjudicative and prosecutorial functions of an agency. The ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of a mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge.

The system of administrative law as we know it is a product of much thoughtful consideration and concern for competence and fairness. One key to this process is the ALJ, and, the integrity of the position must therefore be protected.

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